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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO, and LEYBDA CORPORATION, S.A.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Counsel:
BRUCE J. WINICK, ESQ.

Counsel of Record:
IRA J. KURZBAN, ESQ.
KURZBAN KURZBAN WEINGER AND HOLTSBERG
Plaza 2650 (2nd Floor)
2650 SW 27th Avenue
Miami, Florida 33133
Tel: (305) 444-0060

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the court below in forfeiting a Lear jet based on misrepresentations of crew members in applications for temporary visas erroneously decided that the standard for materiality contained in *Chaunt v. United States,* 364 U.S. 350 (1960), governing misrepresentations in a naturalization application, should not apply to those contained in a visa application?

2. Whether the court below's standard for material misrepresentation under 8 U.S.C. § 1182(a)(19)—that a "misrepresentation may be material because it frustrates the government's ability to assess the visa application in its true light"—reads the requirement of materiality out of the statute, and is inconsistent with the second prong of *Chaunt v. United States,* 364 U.S. 350 (1960) and with *Fedorenko v. United States,* 449 U.S. 490 (1981)?

3. Whether a determination of materiality within the meaning of 8 U.S.C. § 1182(a)(19) is possible in the *total absence* of any evidence in the record concerning the *effect* or even possible effect of a misstatement on the applicants' admissibility into the country, and indeed, where the record demonstrated that the alleged misrepresentations had no effect in view of the subsequent granting of visas to these applicants?

4. Whether the government can sustain a forfeiture based on an alleged violation of 8 U.S.C. § 1182(a)(19), in the absence of *any facts* in the record establishing willfulness of the alleged material misrepresentation, or *any findings* made by the district court concerning such willfulness?

PARTIES TO THE PROCEEDINGS

The Petitioners are: Leybda Corporation, S.A. and One Lear Jet Aircraft, Serial No. 35A-280, Registration No. YN-BVO.

The Respondent is the United States of America.

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OPINIONS BELOW

On March 2, 1987, the United States Court of Appeals for the Eleventh Circuit issued an unreported order denying Petitioners' request for rehearing and suggestion for rehearing *en banc*. (P.A. 39-40). The court has not issued the mandate in this case. The panel decision of the Eleventh Circuit Court of Appeals affirming the decision of forfeiture of the United States District Court for the Southern District of Florida was entered on January 23, 1987, and is reported at 808 F.2d 765 (11th Cir. 1987). (P.A. 1-22).

The district court's unreported final judgment of forfeiture in favor of the Respondent was entered on September 12, 1985 (P.A. 43-44), as was that court's reported opinion. 617 F. Supp. 769 (S.D. Fla. 1985). (P.A. 23-38). Other orders of the district court including its denial of Petitioners' request for rehearing under Fed. R. Civ. P. 59(b) and 60(b) are also not reported. (P.A. 41-42).

JURISDICTION

This petition seeks review of the decision of a panel of the United States Court of Appeals for the Eleventh Circuit entered on January 23, 1987 (P.A. 1-22), affirming the judgment of forfeiture entered by the United States District Court, Southern District of Florida, on September 12, 1985. (P.A. 23-38). The jurisdiction of this Court is pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the standard to be applied in determining material misrepresentations under 8 U.S.C. § 1182(a)(19) in the context of a forfeiture pursuant to 8 U.S.C. § 1324(b).

The statutes in effect at the time of the forfeiture stated:

8 U.S.C. § 1182(a)(19):

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> * * *
>
> (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;

8 U.S.C. § 1324(a):

> (a) Persons liable
>
> Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;
>
> (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto,

transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however*, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

8 U.S.C. § 1324(b)(1):

any vessel, vehicle or aircraft which is used in the commission of a violation of subsection (a) shall be subject to seizure and forfeiture, except when—

(A) the owner, master or other person in charge of such vessel, vehicle or aircraft, was not, at the time of the alleged illegal act, a consenting party or privy thereto.

———o———

STATEMENT OF THE CASE

1. Course of Proceeding, and Disposition of the Case

This case was initiated by the seizure of a Lear jet owned by Petitioner Leybda Corporation, S.A. ("Leybda"). The jet was seized on September 6, 1980 by the Immigration and Naturalization Service ("INS") based upon alleged misrepresentations by the jet's crew members in applications for temporary, nonimmigrant visas presented to the United States Embassy in Managua, Nicaragua in April, 1980. The crew members were not employed by Leybda at the time the applications containing misrepresentations were presented to the Embassy. Rather, they were employed by the Ministry of Transportation of the Government of Nicaragua.

On January 19, 1981, the United States initiated a one count forfeiture action against Leybda's Lear jet. Petitioners' Appendix in the Eleventh Circuit Court of Appeals ("P.C.A.")[1] 27-29. Approximately eighteen months after the action was initiated, the government moved to amend its complaint to add four additional causes of action. R. 1-58, P.C.A. 30-37. Count II of the amended complaint, alleging violations of the Trading with the Enemies Act, was dismissed prior to trial because a civil violation of that Act cannot result in a forfeiture. R. 3-104. Count III, al-

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[1] The following citation abbreviations are used herein: "P.C.A." refers to Petitioners' Appendix submitted with its initial brief in the court of appeals. "Px." refers to Petitioners' exhibits, "Gx." refers to the Government's exhibits, and "L.R." refers to letters rogatory introduced as the court's exhibit in the trial court. "R" refers to the record on appeal. "P.A." refers to Petitioners' Appendix to its Petition in this Court.

leging violations of the Export Administration Act, was dismissed at the government's own request at trial. R. 15-31. The government failed to prove counts IV and V at the trial and judgment was entered on these counts in favor of Petitioners. *United States v. One Lear Jet*, 617 F. Supp. 769, 774, 776 (S.D. Fla. 1985). (P.A. 32-33).

On September 12, 1985, the district court entered its Findings of Fact and Conclusions of Law and Final Judgment. 617 F. Supp. 769 (S.D. Fla. 1985). (P.A. 23-38). In its decision, the district court made no finding that the crew members had *willfully* misrepresented any statements and, in fact, characterized the crew members' statements benignly as not being "accurate" or "correctly listed." 617 F. Supp. at 775. (P.A. 34). In finding that a "material" misrepresentation had been made and in supporting the forfeiture, the district court ignored *Chaunt v. United States*, 364 U.S. 350 (1960) and *Fedorenko v. United States*, 449 U.S. 490 (1981), and held the misrepresentations material on the grounds that "further action may have been taken and further investigation may have been made" or "an investigation . . . may have been commenced." 617 F. Supp. at 775. (P.A. 34). On October 10, 1985, Petitioners moved for a new trial and to reopen the record to consider evidence concerning the lack of material misrepresentations by the Lear jet crew. R. 10-345. The motion was based upon the submission of copies of new D visas issued by the United States Embassy in Managua to the crew members who were, once again, working for the Nicaraguan Government, as they had been when the original visas were issued. The motion was denied. (P.A. 41-42). A panel of the Court of Appeals for the Eleventh Circuit entered its

opinion on January 23, 1987, affirming the district court. 808 F.2d 765 (11th Cir. 1987). (P.A. 1-22).

In affirming the district court, the panel rejected the applicability of *Chaunt* to this case, 808 F.2d at 772 n.5, (P.A. 15), and held that materiality is established when the misrepresentation "frustrates the government's ability to assess the visa application in its true light," 808 F.2d at 771, P.A. 13, or "misleads the government officials with respect to an area of *potential* significance in the decision to grant or deny the visa." 808 F.2d at 773. (P.A. 1677). The Eleventh Circuit thereafter denied Petitioners' request for rehearing and suggestion for rehearing *en banc*. (P.A. 39-40).

2. Statement of Facts

Leybda, a Panamanian corporation, is the owner of the defendant, One Lear Jet Aircraft, Serial No. 35A-280, Registration No. YN-BVO ("Lear jet"). Leybda is a wholly owned subsidiary of Agropecuaria Cardenal, Reyes, S.A., a Nicaraguan corporation. Letters Rogatory[2] of Dr. Jacinto Abregon Sanchez. L.R.-Abregon p. 28, q. 16; P.C.A. 164, 182.

Leybda purchased the Lear jet to use as a commercial vehicle for an air taxi or air charter service and hired the former Finance Minister of the Republic of

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2 Leybda's officers testified by Letters Rogatory and deposition due to the government's continued refusal to agree that they would not arrest any Leybda witness that testified. R. 2-69-6-7; R. 2-71-5-6; R. 19-2-3. Although Leybda's employees and officers believed that any arrest would be without foundation, they did not wish to risk the possibility of entering the United States because of the government's position.

Panama to make the purchase. Deposition of Dr. Gabriel Castro Suarez at 13, P.C.A. 267. The Lear jet was purchased from a United States company, Management Jets International, Inc., and subsequently did serve as an air taxi service in the Carribean and Central America, including among its passengers Wayne Smith, the head of the United States Interests Section in Cuba. R. 10-329a, R. 10-330-3-9.

In 1980 the crew which flew the aircraft began working for the Ministry of Transportation of Nicaragua after Leybda leased the aircraft to the Nicaraguan Ministry of Transportation, leaving the Ministry with the responsibility for all matters concerning the crew. L.R.-Abregon p. 26, q. 14, p. 29 l. 23, C.A. 160, 179; 265, 183.

On April 8, 1980, an official government request by a letter of protocol was made by the Foreign Ministry of the Government of Nicaragua to the United States Embassy in Managua, Nicaragua, to request United States visas for two of the crew members as "pilots in the service of the Transportation Department, who are coming to [the United States] in performance of their normal duties." Gx. 5a, R. 12-42-45. The same protocol letter and official request was made on behalf of the third crew member several days later. *Id.* The letters of protocol accompanied the crew members' Nicaraguan passports and applications for visas, which applications substantiated that they were employed by the Ministry of Transportation. R. 12-44. Leybda was not involved in the application process or any of the requests, as the crew was not employed by it.

The visa applications were not filled in by the crew, but by someone in the Ministry of Transportation; the crew thereafter signed the applications without reviewing them. L.R.-Espinosa p. 12, q. 3(g), P.C.A. 141, 170; L.R.-Toledo p. 20, q. 3(g), P.C.A. 150, 172; L.R.-Herrera p. 21, q. 3(g), P.C.A. 153, 175. The applications truthfully and accurately stated the crew members' names, nationalities, dates of birth, places of birth in Cuba, their place of employment at the Ministry of Transportation, the purpose for their trip to the United States, and all personal statistics Gx. 4A, B, C, R. 12-42. The only discrepancies that the Respondent alleged were the time that the crew members stated they had lived in Nicaragua (Gx. 4A, B, C, q. 36), whether or not they had ever requested a visa to come to the United States previously (Gx. 4A, B, C, q. 11), and in the case of one crew member, whether or not he had ever been in the United States. (Gx. 5C, q. 16).

B-1 and D visas were subsequently issued to the crew members. There is no record evidence to suggest that the crew members' applications, sent by diplomatic channels, were ever reviewed by the United States Embassy before issuing the visas. There is no record evidence that the applications which contained the alleged misstatements were even considered or used as the basis for the issuance of the visas by the U.S. Embassy in light of the official letters of protocol and government-to-government request. R. 13-87; R. 15-154-155 (government stipulation); R. 16-12. Moreover, no testimony was presented at trial by any gov-

ernment witness at the Embassy or by any expert witness stating that the misstatements might have, or would have, made a difference in the issuance of the visas at the Embassy if the true facts were known.

Subsequent to the grant of visas the crew members entered the United States at least eight to twelve times without any incident between April and September, 1980. R. 104-46. L.R. Espinoza, Toledo, Herrera, p. 12, 20, 25, q. 3(h), P.C.A. 141, 169; 151, 172; 157, 175. The admission of crew members, as the government conceded, was facially valid on all occasions. *Id.* None of the crew members ever attempted to enter the United States surreptitiously and all crew members left the United States when they were supposed to leave under the terms of their admission. R. 13-146-48, 154-56 (government stipulation). Nor did the aircraft itself contain any indication that it was used for illegal purposes, such as counterintelligence or drug or alien smuggling. R. 15-190, 192.

On September 1, 1980, the crew were forced to bring the aircraft to the United States for emergency repairs due to a broken fuel computer. L.R.-Espinosa, Toledo, Herrera, p. 12, 20, 25, q. 3(m), P.C.A. 141, 169; 151, 172; 157, 175. The loss of the Lear jet's fuel computer was an extremely serious matter, which prevented the aircraft from being airworthy under FAA standards and could have resulted in its crash. R. 10-316, p. 2 (second set of requests for admission, nos. 2-3); R. 16-53-54. Upon arrival in Miami, the crew members truthfully and accurate-

ly stated the purpose of their trip to the United States. R. 13-115-16, R. 11-97-98, R. 14-158-60. They accurately and truthfully completed I-94 forms. R. 11-64-66, 68; R. 13-125.

Subsequent to their admission, the crew flew the Lear jet directly to a maintenance facility, Graf Jets, in South Florida. R. 16-52. On September 4, 1980, they flew the aircraft out of the United States but were required to make an emergency landing due to a faulty fuel computer. Upon return to their aircraft the following day, they were arrested by a battery of FBI, FAA, INS, and Customs officials. The aircraft was seized the following day. The seizure of the aircraft and the subsequent effort to forfeit it were not based upon fraud or any matter whatsoever involving Leybda, but rather upon misrepresentations made by the Ministry of Transportation of Nicaragua in filling out the original *applications* for temporary visas for the crew members at the United States Embassy in Managua, Nicaragua, while they were employed not by Leybda, but by the Ministry of Transportation.

In 1984, while the forfeiture case was pending, and with knowledge of all the facts, the same crew members once again were issued D visas to enter the United States by the United States Embassy in Managua, Nicaragua. L.R.-Espinosa, Toledo, Herrera, p. 12, q. 2, 3(g); p. 20, q. 2, 3(g); p. 21, q. 2, 3(g), P.C.A. 141, 169; 150, 172; 153, 175; R. 10-345.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN FEDORENKO V. UNITED STATES, 449 U.S. 490 (1981) AND CHAUNT V. UNITED STATES, 364 U.S. 350 (1960), AND WITH EVERY OTHER CIRCUIT COURT OF APPEALS TO HAVE CONSIDERED THE ISSUE.

A. The Decision Below That The Chaunt Standard For Materiality Governing Misrepresentations In A Naturalization Application Should Not Apply To Those Contained In A Visa Application Conflicts In Principle With This Court's Decision In Chaunt, Conflicts Directly With The Decision Of Every Other Court Of Appeals To Have Considered The Question, And Is Presently Before This Court In Kungys v. United States, 107 S. Ct. 431 (No. 86-228, cert. granted, Nov. 10, 1986).

The court of appeals rejected the contention that the standard for materiality of a misrepresentation contained in this Court's decision in *Chaunt v. United States*, 364 U.S. 350 (1960), applied in the context of a visa application. 808 F.2d at 772 n.5. (P.A. 15). *Chaunt* involved the revocation of citizenship, and the panel found *Chaunt* inapplicable "in the context of a forfeiture predicated upon visa fraud." *Id.* This determination, as the government has conceded elsewhere,[3] is inconsistent with the approach of every other court of appeals to have considered the question. *See Maikovski v. INS*, 773 F.2d 435, 441 (2d Cir. 1985) (citing cases), *cert. denied*, 106 S. Ct. 2915 (1986); *United States v. Fedorenko*, 597 F.2d 946, 951 (5th

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[3] Brief for Respondent, *Kungys v. United States*, No. 86-228, at 28 ¶ 5 ("We know of no court that has applied a different standard at the visa stage than at the naturalization stage . . . .")

Cir. 1979), *aff'd on other grounds,* 449 U.S. 490 (1981); *Kassab v. INS,* 364 F.2d 806, 807 (6th Cir. 1966); *United States v. Rossi,* 299 F.2d 650 (9th Cir. 1962); *Langhammer v. Hamilton,* 295 F.2d 642, 648 (1st Cir. 1961).

The applicability of the *Chaunt* test in the visa fraud context is a significant and open question that was referred to in this Court's opinion in *Fedorenko v. United States,* 449 U.S. 490. 508-09 (1981), and is presently before this Court in *Kungys v. United States,* 107 S. Ct. 431 (No. 86-228, *cert. granted,* Nov. 10, 1986) (oral argument scheduled April 27, 1987).[4] For this reason alone, the issue is obviously important and this Court should grant the petition or postpone consideration of it pending decision in *Kungys.*

B. The Court Below's Construction Of The Second Prong Of The Chaunt Test Is Inconsistent With That Case And With Fedorenko v. United States, 449 U.S. 490 (1981), And Would Effectively Eliminate Materiality As A Requirement Of A Violation Of 8 U.S.C. § 1182(a)(19). The Question Of The Proper Meaning Of The Second Prong Of Chaunt Is Also Presently Before This Court In Kungys v. United States, 107 S. Ct. 431 (No. 86-228, cert. granted, Nov. 10, 1986).

As a fall-back, the court of appeals attempted to suggest that even if *Chaunt* did apply in the visa context, "the

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[4] The second question presented in petitioner's petition for certiorari in *Kungys* is "Does same test or tests of materiality for revoking citizenship apply to invalidation of visa?" 55 U.S.L.W. 3335 (Nov. 7, 1986). Significantly, the respondent's brief in *Kungys* does not dispute the applicability of the *Chaunt* test in the visa context. *See* Brief for Respondent, *Kungys v. United States,* No. 86-228, at 28 ¶ 5.

government's evidence in this case was sufficient to satisfy the second prong of the *Chaunt* test." 808 F.2d at 772 n.5. (P.A. 15). However, the panel's various formulations of the test for materiality are quite inconsistent with the formulation of the second prong contained in *Chaunt*, and would read the materiality requirement out of the statute. The second prong of *Chaunt* is that the "disclosure might have been useful in an investigation possibly leading to the discovery of other facts *warranting the denial of citizenship.*" *Chaunt v. United States*, 364 U.S. at 355 (emphasis added).

Although the court of appeals purported to apply this second prong of *Chaunt*, its formulation of the materiality standard was quite different. At one point the court of appeals suggested that "a misrepresentation may be material because it frustrates the government's ability to assess the visa application in its true light." 808 F.2d at 771. (P.A. 13). At another point, the court of appeals concluded that "[t]he essential feature of a material misrepresentation is that it misleads the government officials with respect to an area of *potential* significance in the decision to grant or deny the visa." 808 F.2d at 773. (P.A. 16-17). These standards neglect the requirement in the second prong of *Chaunt* that the investigation might lead to the discovery of other facts which themselves would warrant the denial of the application. *All* misrepresentations, by their nature, "frustrate[] the government's ability to assess the visa application in its true light." As a result, the court of appeals' formulation of the standard encompasses all misrepresentations, whether material or not. Congress plainly and expressly required that, for a for-

feiture to occur, the misrepresentation be material. 8 U.S.C. § 1182(a)(19) ("willfully misrepresenting a material fact"). Similarly, the formulation of the standard in terms of "potential significance" is too all encompassing. Every misrepresentation has potential significance on the decisionmaking process; however, it is only those that are "material," *i.e.*, those that would have had an effect on the applicant's admissibility, that should be held to meet this standard. *See Fedorenko v. United States*, 449 U.S. 490, 509 (1981) ("It is, of course, clear that the materiality of a false statement in a visa application must be measured in terms of its effect on the applicant's admissibility into this country.").

The court of appeals' formulation of the test is thus quite inconsistent with this Court's opinion in *Chaunt*, directly contrary to *Fedorenko's* clear statement that materiality must be measured "in terms of its effect" on admissibility, and would read the materiality requirement out of the statute. The proper meaning of the second prong of the *Chaunt* test of materiality is also presently before this Court in *Kungys v. United States*, 107 S. Ct. 431 (No. 86-228, *cert. granted*, Nov. 10, 1986).[5] Accordingly, the petition should be granted or its determination should be postponed pending decision of this issue in *Kungys*.

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[5] The first question presented in petitioner's petition for certiorari in *Kungys* is "Which, if any, of several conflicting and divergent formulations interpreting second prong of *Chaunt v. U.S.* governs heavy burden of proving 'material' misrepresentation in order to denaturalize citizen?" 55 U.S.L.W. 3335 (Nov. 7, 1986).

II. CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER A DETERMINATION OF MATERIALITY WITHIN THE MEANING OF 8 U.S.C. § 1182(a)(19) IS POSSIBLE WHERE THERE IS A TOTAL ABSENCE OF EVIDENCE CONCERNING THE EFFECT OF THE MISSTATEMENTS AND WHERE VISAS WERE SUBSEQUENTLY ISSUED TO THE INDIVIDUALS WHO MADE THE MISSTATEMENTS AFTER FULL DISCLOSURE OF ALL FACTS.

In order to determine materiality of a false statement there must be evidence in the record sufficient to support the conclusion that the false statements in question would have had an effect on the applicant's admissibility. Here, there was no evidence in the record whatsoever concerning the likely effect, or even possible effect, of these misstatements on admissibility. Rather, the court of appeals concluded, apparently as a matter of law, that these misstatements were material. *See* 808 F.2d at 772. (P.A. 14) ("We have little doubt that these misrepresentations were 'material' for purposes of 8 U.S.C. § 1182(a)(19)"); 808 F.2d at 773. (P.A. 16) ("Disclosure of the true facts on the visa applications involved in this case almost certainly would have effected the decision made in 1980 with regard to those applications by the United States Embassy in Managua.") There quite simply is no record support whatsoever for these inferences.

Indeed, the record supports just the opposite conclusion. The very best evidence concerning the effect of the misstatements on the admissibility of these applicants is the subsequent grant of the three crew members' applications in 1984 when the true facts were known. L.R.-Espinosa, Toledo, Herrera p. 12, q. 2, 3(g); p. 20, q. 2, 3(g); p. 21,

q. 2, 3(g), P.C.A. 141, 169; 150, 172; 153, 175; R. 10-345. The court of appeals' attempts to ignore this significant evidence in the record by asserting that Petitioner "has not produced documentary evidence that these visas have in fact been granted." 808 F.2d at 772. (P.A. 16).

In fact, this assertion is false. Petitioners did produce copies of the subsequent visas issued to the crew members in 1984. R. 10-345. Moreover, the court of appeals mentioned that the "government disputes that these visas were granted noting that because they were previously deported, the crew members could only have been granted visas by special permission of the attorney general." 808 F.2d at 772. (P.A. 16). However, the record is barren of any evidence whatsoever submitted by the government in support of such a contention. Rather, the government raised this contention as legal argument in response to Petitioner's Motion for Reconsideration submitted in the district court. Arguments of counsel are not facts, however, just as litigation affidavits of counsel containing *post hoc* rationalizations are not facts. *See Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 419 (1971).

Moreover, the uncontradicted evidence *in the record* demonstrated that the visa applications of the crew members were submitted by the government of Nicaragua, Gx. 5a, R. 12-42-45. As a government-to-government request, there was no evidence to indicate that the Consul at the United States Embassy would have investigated or denied the request under *any* circumstances. Indeed, there is no evidence in the record to indicate that the visa applications were even reviewed by the United States Embassy as they

were sent as protocol documents from the Foreign Ministry of Nicaragua to the United States Embassy. R. 13-87; R. 15-154-55 (government stipulation); R. 16-12.

The court of appeals conceded that merely being a former Cuban citizen—the subject matter of the misstatement—was not itself disqualifying for admissibility as a matter of law. 808 F.2d at 772, (P.A. 14) ("these regulations certainly would not preclude the issuance of a visa to former Cuban citizens"). As a result, any conclusion that these misstatements would have effected admissibility must be supported by competent testimony by a consular or other official knowledgeable with respect to non-immigrant visa applications and the effect such misstatements have on the consular decisionmaking process. Because there was no evidence whatsoever of this kind in the record, or any other evidence supporting the court of appeals' conclusion, certiorari should be granted to clarify that the question of materiality is a question of fact which must be supported by evidence in the record.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION BELOW WOULD PERMIT A FORFEITURE BASED UPON AN ALLEGED VIOLATION OF 8 U.S.C. § 1182(a)(19) WITHOUT ANY FINDING OF WILLFULNESS OR ANY FACTS IN THE RECORD TO SUPPORT SUCH A FINDING.

In order to establish the predicate violation of 8 U.S.C. § 1182(a)(19), it must be shown that the alien in question has procured a visa or other documentation "by fraud, or by *willfully* misrepresenting a material fact . . . ." (emphasis added); *see, e.g., Fedorenko v. United States*, 449 U.S. 490, 507 & n.28 (1981); *Hernandez-Robledo v. INS*, 777 F.2d 536, 539 (9th Cir. 1985); *Castaneda-Gonzalez v.*

INS, 564 F.2d 417, 434 (D.C. Cir. 1977); *Espinoza-Espinoza v. INS*, 554 F.2d 921, 925 (9th Cir. 1977). Under this provision, the government must show not only materiality of the misrepresentation, but also "the separate and independent requirement of willfullness." *Castaneda-Gonzalez v. INS*, 564 F.2d at 434.

Here, the record contains absolutely *no* evidence concerning willfulness, and the district court made *no* findings whatsoever on this critical factor. *See* 617 F. Supp. 769 (S.D. Fla. 1985). (P.A. 23-38). The court of appeals mistakenly stated that the district court had found willfulness, and then concluded that this finding was not clearly erroneous. 808 F.2d at 771. (P.A. 11-12). Not only did the district court fail to make the requisite finding of willfulness, but it characterized the crew members' statements benignly, as not being "accurate" or "correctly listed." 617 F. Supp. at 775. (P.A. 34).

In order to establish the necessary element of willfulness, the government must show through evidence in the record that the material misrepresentation was "knowingly and intentionally" made. *Castaneda-Gonzalez v. INS*, 564 F.2d at 434. The misrepresentation must be shown to have been "deliberate and voluntary." *Hernandez-Robledo v. INS*, 777 F.2d at 539; *Espinoza-Espinoza v. INS*, 554 F.2d at 925. The record contains absolutely no evidence whatsoever that these statements, even if inaccurate, were either deliberate and voluntary, or knowingly and intentionally made. Because the court of appeals totally ignored this critical requirement, certiorari is appropriate to clarify whether a violation of 8 U.S.C. § 1182(a)(19) can occur without a finding of willfulness.

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CONCLUSION

By accepting certiorari in *Kungys v. United States* on the very issues presented here concerning the applicability of *Chaunt v. United States* to visa applications and the meaning of the second prong of the *Chaunt* test, this Court has recognized the significance of those issues. The decision of the Eleventh Circuit challenged here finding *Chaunt* inapplicable to visa applications is also directly in conflict with the decisions of all other circuits that have addressed the question. Moreover, the standard applied by the Eleventh Circuit in finding a material misrepresentation without any evidence in the record concerning the effect of the misstatements and without any record support for a finding of willfulness is unprecedented and clearly at odds with this Court's opinions in *Chaunt* and *Fedorenko*. For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

KURZBAN KURZBAN WEINGER
& HOLTSBERG
Plaza 2650, Second Floor
2650 S.W. 27th Avenue
Miami, Florida 33133
(305) 444-0060

BRUCE J. WINICK, ESQ.

By: IRA J. KURZBAN, ESQ.

UNITED STATES of America,

Plaintiff-Appellee,

v.

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO, Defendant,

Leybda Corp., Claimant-Appellant.

No. 85-5938.

United States Court of Appeals, Eleventh Circuit.

Jan. 23, 1987.

Action was brought for forfeiture of aircraft. The United States District Court for the Southern District of Florida, 617 F.Supp. 769, No. 81-6031-CIV-LCN, Lenore Carrero Nesbitt, J., upheld forfeiture, and aircraft's owner appealed. The Court of Appeals, Clark, Circuit Judge, held that: (1) Government's removal of aircraft during pendency of appeal did not deprive court of jurisdiction to entertain that appeal; (2) action based on predicate offense of visa fraud fell within scope of narrow construction of forfeiture statute; (3) district court's finding that aliens' misrepresentations on visa application were willful was not clearly erroneous; (4) Government was not required to establish causal relation between misrepresentations and granting of visa application for those misrepresentations to be material; (5) Government could refuse discovery request for documents which district court had found were privileged and irrelevant; (6) aircraft owner's

request, more than four years after filing of complaint, for jury trial was untimely; and (7) district court was not required to grant continuance or order mistrial based on FBI agent's late disclosure of notes regarding investigation.

Affirmed.

* * *

Ira J. Kurzban, Kurzban, Kurzban & Weinger, P.A., Miami, Fla., for claimant-appellant.

Leon B. Kellner, U.S. Atty., Jonathan Goodman, David O. Leiwant, Sonia Escobio O'Donnell, Asst. U.S. Attys., Miami, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before CLARK, EDMONDSON and KEITH*, Circuit Judges.

CLARK, Circuit Judge.

This is a civil forfeiture action brought by the United States against a Lear jet. The government alleged, *inter alia,* that the jet's crew members entered this country illegally, having made material misrepresentations on their visa applications. *See* 8 U.S.C. § 1182(a)(19). These violations would trigger the criminal penalty provisions of 8 U.S.C. § 1324(a) and, in turn, the civil forfeiture provisions of 8 U.S.C. § 1324(b) (West Supp.1986). Leybda Corporation, a Panamanian subsidiary of a Nicaraguan corporation, claims ownership of the jet and challenges the validity of the forfeiture. The district court, 617 F.Supp. 769, upheld the forfeiture. We affirm.

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*Honorable Damon J. Keith, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

FACTS

Leybda purchased the jet from a dealer in Lincoln, Nebraska for 3.3 million dollars in February, 1980. According to Leybda, the jet was used as an air taxi, flying government officials from the United States, Nicaragua, Jamaica, and other countries to different parts of North and South America and the Caribbean. The pilot (Espinosa) and the two crew members (Toledo and Herrera) were Cuban nationals who had previously worked for Cubana de Aviacion, the Cuban national airline. Between April and September of 1980, the jet and crew entered the United States eight to twelve times, apparently without incident.

On September 1, 1980, the jet landed at Miami International Airport. The jet had just left Cuba and came to Miami to repair a faulty fuel computer. Espinosa, Toledo and Herrera presented their Nicaraguan passports to United States custom inspectors. They each had facially valid non-immigrant B-2 and D-1 visas issued by the United States Embassy in Managua. The applications for these visas had been submitted, along with supporting Letters of Protocol from the Nicaraguan government, to the United States authorities in Managua in April, 1980.

Upon arrival in Miami, the crew members filled out several United States immigration forms. They each claimed to be Nicaraguan citizens and claimed they boarded the jet in Managua. Each listed Cuba as their place of birth and gave their Nicaraguan passport numbers.

On September 2, the crew flew the jet to Ft. Lauderdale for repairs. They attempted to leave on September 4, but had to turn back because of additional problems with the fuel computer. When the crew returned to the jet on September 5, they were being watched by F.B.I. and I.N.S. agents, who had received information that the jet was

being operated by the Cuban government. The crew members were seen talking to Oscar Vasquez, who is listed on corporate documents as Leybda's vice president, although Leybda claims it terminated Vasquez' employment on April 1, 1980.[1] The agents interviewed the four men. Espinosa showed his Nicaraguan pilot's license and told the agents that the jet belonged to a Panamanian company with which Vasquez was affiliated. The crew members denied having applied for visas as employees of Cubana Airlines. The three were arrested and charged with violating United States immigration laws, and the jet was seized.

Each crew member subsequently pled guilty to charges of knowingly possessing a visa application which contained false statements, in violation of 18 U.S.C. § 1546. A United State immigration judge found that Espinosa, Toledo and Herrera were admitted to the United States by presenting a visa obtained by the filing of an application misrepresenting material facts.

The district court found that the crew members made several material misrepresentations in their April, 1980 visa applications. We accept the factual findings of the district court unless they are clearly erroneous. *See United States v. Koziy,* 728 F.2d 1314 (11th Cir.), *cert. denied,* 469 U.S. 835, 105 S.Ct. 130, 83 L.Ed.2d 70 (1984). Espinosa was born in Cuba and lived there for the first thirty-four years of his life. Yet, although he listed Cuba as his place of birth, he told United States authorities in Managua that he was a Nicaraguan national and he failed to include Cuba as one of the countries he had lived in for more than

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1. At trial, the government used Vasquez' affiliation with Leybda to show that Leybda was aware of the immigration violations committed by the crew members. The government also attempted to show that Vasquez was connected in some way to the Cuban government.

six months during the preceding five years. He also denied submitting any prior applications for a United States visa. Yet he applied for a visa in June, 1979, when he was employed by Cubana Airlines.

Toledo also denied making any prior visa applications. The government showed that Toledo in fact submitted two prior visa applications to the United States Interest Section in Havana, the latest one being submitted in January, 1980. In the Managua visa application, Toledo indicated that he had resided in Nicaragua for the prior ten years. In the January, 1980, application, however, he listed a Cuba address as his domicile.

Herrera submitted three visa applications in Havana prior to submitting his application in Managua. In his Managua application, however, Herrera denied making any prior visa applications. He represented that he had lived in Nicaragua for the previous six years, although in one of his prior visa applications he stated that he had lived in Cuba his entire life.

At trial, the government contended that these misrepresentations were material and that Leybda had knowledge that these misrepresentations were made.[2] The district court found for the government and decreed that the jet was forfeited to the United States government. *United States v. One Lear Jet Aircraft,* 617 F.Supp. 769 (S.D.Fla. 1985). Leybda appeals from the district court's decision.

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2. The government offered unrebutted evidence that Oscar Vasquez acted as Leybda's agent and directed the operations of the jet and crew. In fact, in light of Leybda's reluctance to present testimony from its officers, the district court found that Vasquez was the *only* individual acting on behalf of Leybda during the events which occurred prior to the seizure of the aircraft. 617 F.Supp at 775.

I. JURISDICTION

Before proceeding to the merits, we must confront the government's assertion that this court lacks jurisdiction to entertain this appeal. Final judgment in this case was entered on September 12, 1986. On October 4, 1986, the jet was flown by the government to a private facility in Missouri. Leybda, having already noticed this appeal, noticed an appeal to the Eighth Circuit Court of Appeals. That court dismissed the appeal for lack of jurisdiction. The government asserts that this court lost jurisdiction when the jet, the res in this in rem action, was moved outside the territorial jurisdiction of this court.

The government relies on our decisions in *L.B. Harvey Marine, Inc. v. M/V River Arc,* 712 F.2d 458 (11th Cir. 1983) ("The presence of the res within a court's territorial jurisdiction is necessary before a court can proceed to adjudication."), and *Taylor v. Tracor Marine, Inc.,* 683 F.2d 1361 (11th Cir.1982) ("Where the res is no longer before the court, its in rem jurisdiction is destroyed, and any appeal from its decision is rendered moot."), *cert. denied,* 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983).

L.B. Harvey and *Taylor* are distinguishable from the present case. In *L.B. Harvey,* a ship was arrested by the court pursuant to a creditor's claim of a maritime lien. After a post-seizure hearing, the court dissolved the warrant of arrest. The ship had been scheduled to leave port on the day the warrant was dissolved, and the ship did in fact leave the jurisdiction on that day. We noted that "[a]ccidental, fraudulent, or improper removal of the res from the district does not destroy in rem jurisdiction once it existed," but there were no charges of impropriety in

that case. 712 F.2d at 459. Although we do not suggest that the government intended to defraud Leybda or this court, it is apparent that there was no proper motive for removing the aircraft from this jurisdiction, especially since Leybda had already filed a notice of appeal.[3] The government has offered no explanation for its decision to store this jet in Missouri as opposed to Florida, instead relying exclusively on the fact that if Leybda wanted to avoid a loss of jurisdiction it could have moved for a stay of execution pending an appeal or it could have posted a supersedeas bond. Although *L.B. Harvey* and *Taylor* refer to the appellants' failure to utilize such procedures, the government may not raise such an argument without showing some justification for removing the res from the jurisdiction. In reaching this conclusion, we are guided by "[a]n interest in justice rather than an automatic reliance upon rigid legalism." *Treasure Salvors v. Unidentified*

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3. The government argues that their motive in removing the jet from the jurisdiction was not improper. In support of this proposition, the government has cited *United States v. $79,000 in U.S. Currency*, 801 F.2d 738 (5th Cir.1986). In *$79,000*, the court held that the removal of forfeited currency from the jurisdiction deprived the court of the power to hear the appeal. "The government merely acted in its own favor by quickly initiating action to surrender the monies; its actions do not rise to the level of fraud or impropriety . . . ." *Id.* at 740. The key distinction between *$79,000* and the instant case lies in the nature of the forfeited property. When the government removes forfeited *currency* from the jurisdiction, the forfeited property confers a benefit upon the government apart from the avoidance of an appeal. The currency becomes mixed in with the rest of the money in the federal coffers. In this case, the removal of the jet confers no benefit on the government unless it suffices to deprive the court of jurisdiction. The jet is merely being warehoused in another jurisdiction. Where the only apparent motive behind removing the res from the jurisdiction is to obtain dismissal of an appeal, this court will retain jurisdiction.

Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 334 (5th Cir.1978).

In *Taylor,* crew members sued in rem against a vessel to obtain payment of past wages. The vessel was sold and the proceeds were distributed to priority lienholders. We dismissed the claim as moot since the res was no longer located in the jurisdiction, but noted that "[h]ad this case also involved claims in personam, jurisdiction might still lie." 683 F.2d at 1362 n.2 (citing *Treasure Salvors, supra,* and *Inland Credit Corp. v. M/T BOW EGRET,* 552 F.2d 1148 (5th Cir.1977)). Jurisdiction in this case is not based solely on the presence of the res in the jurisdiction. The government, by bringing this action, has submitted itself to the personal jurisdiction of this court. *See Adam v. Saenger,* 303 U.S. 59, 67-68, 58 S.Ct. 454, 458, 82 L.Ed. 649 (1938); *cf. Treasure Salvors,* 569 F.2d at 335 (government, by intervening in the action and by stipulating to the court's admiralty jurisdiction, waived the usual requirement that the res be present). Moreover, the district court had personal jurisdiction over Leybda by virtue of Leybda's intervention in this matter. *See Treasure Salvors,* 569 F.2d at 335 & n. 6. Thus, since this court has the power to fashion an effective remedy (i.e., requiring the government to return the aircraft), the appeal is not mooted by the fact that the res is outside the jurisdiction. *Cf. Taylor,* 683 F.2d at 1362 (since proceeds from sale of vessel had already been disbursed, any order which the court might issue would be an "empty gesture").

In sum, we note that the fiction of an inanimate object as a defendant is designed to effectuate the adjudication of disputes. The use of this fiction in an attempt

to avoid resolution of disputes is disfavored. *See Treasure Salvors,* 569 F.2d at 334. The government's decision to remove the aircraft from this jurisdiction while Leybda's notice of appeal was pending, and for no objectively justifiable reason, does not deprive this court of jurisdiction to entertain this appeal.

II. SCOPE OF THE IMMIGRATION FORFEITURE STATUTE

This is an unusual forfeiture case because the underlying offense does not concern alien smuggling or drug trafficking. The district court observed that this was the first reported forfeiture case where the predicate offense was visa fraud.[4] 617 F.Supp. at 776. Leybda argues that this "unprecedented extension" of 8 U.S.C. § 1324 is inconsistent with the general rule that forfeiture statutes be construed narrowly. *See United States v. One 1977 Cadillac,* 644 F.2d 500, 501 (5th Cir. Unit B May 1981). We disagree. Leybda's reading of the statute to preclude reliance on visa fraud as a predicate to forfeiture disregards the clear language of the forfeiture statute.

Although alien smuggling was a major target of 8 U.S.C. §1324, it was not the only target. Section 1324(b) allows for forfeiture when a vehicle is involved in the violation of one of the predicate offenses defined in § 1324(a). Section 1324(a) provides:

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4. Leybda's expert witness, Donald Berman, testified that he had never seen the forfeiture statute used in this manner. "I have seen it used for large scale or even single alien smuggling. But I have never seen it when there was a question of paperwork." Record, Vol. 17 at 12.

(a) Persons liable

Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—

any alien, including any *alien crewman*, not duly admitted by an immigration officer or *not lawfully entitled to enter or reside within the United States* under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (includ-

> ing the usual and normal practices incident to employment) shall not be deemed to constitute harboring. (emphasis added)

Although we agree with Leybda that forfeiture statutes should be construed narrowly, there is no room for interpretation in this case. The aircraft was used to bring into the United States "an alien crewman . . . not lawfully entitled to *enter* or reside within the U.S." This case fits squarely within the scope of the statutory language.

III. MATERIALITY OF MISREPRESENTATIONS

Forfeiture under 8 U.S.C. § 1324(b) is predicated on the violation of § 1324(a). Section 1324(a), however, merely provides that aiding the "unlawful" entry of aliens is a felony. To determine whether the entry was "unlawful," § 1324(a) directs us to look to "the terms of this chapter or any other law relating to the immigration or expulsion of aliens." 8 U.S.C. § 1324(a). In this case, the government alleges the aircraft was used in an entry which was unlawful under 8 U.S.C. § 1182(a)(19), which provides that:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> . . . .
>
> (19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;

The district court found that Espinosa, Herrera, and Toledo willfully misrepresented facts in their Managua

visa applications. These factual findings are not clearly erroneous, and they will be accepted by this court. The court also found that these misrepresentations were material because if the applications had been accurate, "further action may have been taken and further investigation may have been made by U.S. Customs officials." 617 F.Supp. at 775. The officials "might have considered the applications in a different light and at the very least conducted further inquiry." *Id.* Furthermore, "an investigation into the relationship between the appellants and Cuba may have been commenced." *Id.* Materiality is a mixed question of fact and law. To the extent these statements are findings of fact as to the probability of further investigation, they are not clearly erroneous, and are accepted. Leybda contends the district court applied an incorrect legal standard in holding that, because of the probability of further investigation, the misrepresentations were material.

Leybda argues that the district court should have required the government to prove that, but for the misrepresentations, the crew members *would* have been ineligible to receive visas. We disagree. Under 8 U.S.C. § 1182(a)(19), the government need not establish such a causal relation between the misrepresentation and the granting of the visa application. *See Duran-Garcia v. Neelly,* 246 F.2d 287 (5th Cir.1957). In *Duran-Garcia,* the misrepresentation involved was somewhat similar to the ones involved in the present case. A Mexican citizen received a "crossing card" entitling her to shop and visit in the United States. When government authorities subsequently discovered that she was living and working in the United States, they cancelled her crossing card and

granted her the privilege of voluntary departure to Mexico in lieu of deportation. Three years later, and under a new name, she again applied for a local crossing card for the stated purpose of shopping and visiting. She again began to live and work in Texas. In a subsequent deportation proceeding, an immigration officer concluded that in her second application she failed to disclose the true purpose of her visit and failed to disclose the fact that she had previously accepted voluntary departure in lieu of deportation. This court held both misrepresentations to be material under 8 U.S.C. § 1182(a)(19). The failure to disclose the prior "quasi deportation proceedings" was material because it would "have suggested further inquiry into appellant's actual motives." Significantly, we held that the government need not show that there existed underlying facts which, if discovered after further inquiry, would have precluded the grant of a visa:

> Though perhaps a complete inquiry would have resulted in a discovery of no other material facts than the previous involuntary departure, it has been held that any concealment of information that tends to frustrate the proper official investigations is grounds for excludability under the statute, particularly if the deception is directed primarily against the United States. Landon v. Clarke, [239 F.2d 631 (1st Cir. 1956]. . . .

Id. at 291. Thus, according to *Duran-Garcia,* a misrepresentation may be material because it frustrates the government's ability to assess the visa application in its true light.

In this case, each crew member misrepresented at least three facts: (1) their residency in Cuba during the period

immediately prior to filing the visa application; (2) their prior submission of visa applications to the United States Interest Section in Havana; and (3) their prior employment as pilot and crew members for Cubana Airlines. We have little doubt that these misrepresentations were "material" for purposes of 8 U.S.C. § 1182(a)(19). As in *Duran-Garcia,* disclosure of the applicant's close ties with Cuba would have changed the very nature of their applications. The reluctance of the United States to engage in all forms of trade with Cuba is evident in our export regulations. *See* 15 C.F.R. § 385.1 (noting general policy to deny all applications to trade with countries in group Z, one of which is Cuba.) It is also clear that the United States' reluctance to trade with Cuba stems from concerns over national security and foreign policy. *Id.* While these regulations certainly would not preclude the issuance of a visa to former Cuban citizens, they indicate the significance of the misrepresentations in this case. Since the misrepresentations deprived the United States officials in Managua of the opportunity to weigh the true implications of their decision to grant visas to these crew members, these misrepresentations were material for purposes of 8 U.S.C. § 1182(a)(19). *Cf. United States v. Palciauskas,* 734 F.2d 625, 628 (11th Cir. (1984) (failure to disclose former employment as mayor of Nazi controlled town was a material misrepresentation on a citizenship application, even though applicant might have been able

to convince authorities that mayorship was a figurehead position).[5]

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5. We are aware of several decisions discussing materiality in the context of denaturalization proceedings. In *Chaunt v. United States*, 364 U.S. 350, 81 S.Ct. 147, 5 L.Ed.2d 120 (1960), the Supreme Court decided that where the government seeks to revoke an individual's citizenship because of a material misrepresentation on a citizenship application, the government must show either: "(1) that facts were suppressed which, if known, would have warranted denial of citizenship or (2) that their disclosure *might* have been useful in an investigation *possibly* leading to the discovery of other facts warranting the denial of citizenship." *Id.* at 355, 81 S.Ct. at 151 (emphasis added). We do not believe that *Chaunt* applies in the context of a forfeiture predicated upon visa fraud. *Accord Fedorenko v. United States*, 449 U.S. 490, 508, 101 S.Ct. 737, 748, 66 L.Ed.2d 686 (1981) (dicta) (suggesting that distinction between citizenship application and visa application could render *Chaunt* inapplicable to situations involving the latter); *id.*, 101 S.Ct. at 755 (Blackmun, J., concurring) (where government seeks to revoke the precious right of citizenship, it may do so only on "scrupulously clear justification and proof"). Even if *Chaunt* does apply in this context, the government's evidence in this case was sufficient to satisfy the second prong of the *Chaunt* test.

Leybda also contends that *Fedorenko, supra*, requires reversal of the district court's opinion in light of the Supreme Court's statement that "the materiality of a false statement in a visa application must be measured in terms of its effect on the applicant's admissibility into this country." 449 U.S. at 509, 101 S.Ct. at 749. We disagree. While *Fedorenko* involved misrepresentations on a visa application, the government in that case was seeking to revoke Fedorenko's citizenship because of his misstatements. Again, in the denaturalization context the government is held to a very high standard of proof. The Court declined to consider whether the *Chaunt* test applied when the misstatements were made upon the individual's initial entry into the country rather than upon his application for citizenship. The misstatements were material under any standard since Fedorenko's former employment as an armed guard at the Treblenka concentration

(Continued on following page)

Leybda places great reliance on its allegation that, in 1984, the three crew members involved in this case were granted visas to enter the United States. The only evidence supporting this allegation comes from the testimony of the crew members themselves through letters rogatory. The government disputes that these visas were granted, noting that because they were previously deported, the crew members could only have been granted visas by special permission of the attorney general. 8 U.S.C. § 1182 (a)(17). Leybda has not produced documentary evidence that these visas have in fact been granted.

Assuming arguendo that the crew received visas in 1984, our holding that the 1980 misstatements were material would remain unchanged. The theory underlying *Duran-Neelly* and *Palciauskas* is that misrepresentations are material if they could have had a significant impact on the decision making process of the immigration official authorized to grant or deny the visa. Disclosure of the true facts on the visa applications involved in this case almost certainly would have affected the decision made in 1980 with regard to those applications by the United States embassy in Managua.

The essential feature of a material misrepresentation is that it misleads the government officials with respect

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(Continued from previous page)

camp would have, if disclosed, disqualified him from obtaining citizenship as a matter of law. Given the unusual circumstances in *Fedorenko,* the Court's unwillingness to develop a new materiality standard, and the fact that the government was seeking denaturalization as opposed to forfeiture, we find that *Fedorenko* has little bearing on the present case.

to an area of *potential* significance in the decision to grant or deny the visa By hiding their past association with Cubana Airlines, their lifetime residence in Cuba, and their prior visa applications as Cuban citizens, the crew members deprived the United States officials in Managua of the chance to assess the international implications raised by their visa applications. Since an applicant's prior association with Cuba is a significant area of inquiry, failure to disclose such a prior association is a material misrepresentation under 8 U.S.C. § 1182(a)(19).

IV. BURDEN OF PROOF ON THE INNOCENT OWNER DEFENSE

The district court found that Leybda failed to prove an absence of actual knowledge of the violations of 8 U.S.C. § 1324(a). 617 F.Supp. at 775. Leybda contends that, under the version of § 1324(b) applicable at the time of the forfeiture, the burden was on the government to prove Leybda's actual knowledge of the illegality.

In 1980, when this proceeding began, § 1324(b) was silent on the issue of burden of proof. The language with regard to the "innocent owner" defense was the following:

> No conveyance used by any person as common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to the illegal act.

8 U.S.C. § 1324(b)(1)(A). A 1981 amendment to the statute makes it clear that once the government establishes probable cause for instituting the forfeiture action, the

burden of proof shifts to the claimant. 8 U.S.C. § 1324(b)(5) (West Supp.1986). Leybda points to the amendment and accompanying legislative history[6] in support of its argument that, under the 1980 version of the statute,[7] the government bore the burden of proof.

At trial, Leybda conceded the burden of proof issue on two separate occasions. Just before the government's first witness was called, the government argued that Leybda had the burden of proof on the innocent owner defense. After the court expressed its agreement with the government's position, Leybda's counsel said "I think Mr. Goodman [the U.S. Attorney] is right about that." Record, Vol. 11 at 55. Again, during closing argument, Leybda's counsel stated "it is true that Leybda Corporation must prove that they did not have actual knowledge." Record, Vol. 19 at 31.

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6. The House Report on the 1981 amendment indicated that the law was being strengthened in order to remove ambiguity regarding the government's responsibilities in forfeiture procedures. The report notes that "the Office of Legal Counsel for the Department of Justice concluded that while existing law can be read to permit seizure prior to any inquiry as to the owners complicity, the government bears the burden of establishing actual knowledge on the part of the owner to affect a forfeiture of the conveyance." 1981 U.S.Code Cong. & Admin. News 2577, 2596-97. The report goes on to note that "this legislation relieves the government of the burden of proving actual knowledge on the part of owners." *Id.* at 2597. According to Leybda, the foregoing shows that, under pre-1981 law, the government was required to prove actual knowledge.

7. At trial, the government conceded that the 1980 version of the statute applies to this case. We are, of course, not bound by this concession, but given our disposition of this matter we find it unnecessary to pass upon the retroactivity of the 1981 amendments.

An appellate court generally will not consider an issue raised for the first time on appeal unless failure to do so would result in a miscarriage of justice. *Sanders v. United States,* 740 F.2d 886, 888 (11th Cir.1984). This is especially true where the appellant pursued a contrary position before the district court.[8] *Id.* Failure to decide the burden of proof issue is not a miscarriage of justice in this case because we find, upon examination of the record, that the government offered sufficient evidence of actual knowledge to satisfy the burden of proof, assuming the government bore that burden under the 1980 version of the statute.

V. OTHER ISSUES

A. *Use Of Hearsay.*

Leybda complains that much of the evidence relied on by the district court was inadmissible hearsay. The most damaging evidence introduced by the government, i.e. the visa applications and Leybda's corporate records, was admissible under the government and business records exceptions to the hearsay rule. *See* Fed.R.Evid. 803(6) & (8). To the extent hearsay was improperly admitted, we find any error harmless. *See Fishing Fleet Inc. v. Trident Insurance Co.,* 598 F.2d 925 (5th Cir.1979) (in a bench

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8. Leybda points out that it contested the burden of proof issue in the parties' pretrial stipulation. Still, the issue was not squarely before the district court because the pretrial stipulation preceded Leybda's concession of this issue at trial.

trial it is presumed that a ditsrict judge's findings are based on admissible evidence).[9]

B. *Assertion Of Privileges By The Government.*

During discovery, the government refused to produce certain documents because the documents were said to be protected by various privileges. The government contended that the documents contained sensitive information and submitted the documents to the district court for *in camera* review. The district court upheld the government's claims of privilege and found that the documents were irrelevant to this case. Leybda argues on appeal that the government was improperly permitted to invoke the jurisdiction of the court while hiding behind privileges in an attempt to hinder Leybda's defense. We are persuaded that the district court's finding that the documents were privileged and irrelevant precludes Leybda's argument that the government should have had to "disclose or dismiss."

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9. The government argued that otherwise inadmissible hearsay is admissible in a forfeiture proceeding to establish probable cause for instituing the proceeding. *See Bush v. United States*, 389 F.2d 485, 489 (5th Cir.1968). 8 U.S.C. § 1324(b)(5), enacted in 1981, makes clear that the government need only establish probable cause in order to shift the burden of proof over to the claimant. *Bush* makes clear that hearsay would be admissible to satisfy the government's burden under this statute. Again, given our disposition of this issue, we need not decide the extent of the government's burden under the 1980 version of the statute. As a result, we express no opinion as to the applicability of *Bush* where the government's burden is greater than merely the establishment of probable cause.

C. *Request For A Jury Trial.*

The government's complaint in this case was filed on January 19, 1981. Leybda requested a jury trial pursuant to Fed.R.Civ.P. 39(b) on June 25, 1985. Leybda's sole argument in support of its 39(b) motion was that the district court viewed allegedly prejudicial government documents during an *in camera* proceeding to determine whether the documents were privileged. This procedure did not render the district judge incapable of presiding over a fair bench trial. The district court did not abuse its discretion in denying Leybda's jury trial request as untimely. *See Parrott v. Wilson,* 707 F.2d 1262, 1267 (11th Cir.), *cert. denied,* 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983).

D. *Surprise Evidence.*

On the eve of trial, FBI Agent Duran notified the United States Attorney that he had discovered additional notes regarding his investigation. These notes were turned over to Leybda's counsel. Leybda contends that the district court should have granted a continuance or ordered a mistrial since these notes revealed "scores of new eyewitnesses." The district court made every attempt to allow Leybda to conduct additional discovery during trial. Moreover, there is no indication that Leybda was prejudiced by the late disclosure of the notes. The United States Attorney, who had no previous knowledge that the notes existed, made no use of the notes at trial. In addition, the eyewitness most prominently mentioned in the notes, David Block, would not have been a crucial witness. Block's plane landed in Miami just after the Lear Jet landed, and

he observed the jet's crew while they were being inspected by custom officials. Under these circumstances, the district court was not required to declare a mistrial, and its efforts to facilitate discovery during trial were a sufficient substitute for a continuance.

VI. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES of America, Plaintiff,

v.

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO, Defendant.

No. 81-6031-Civ.

United States District Court, S.D. Florida, S.D.

Sept. 12, 1985.

Action was brought for forfeiture of aircraft. The District Court, Nesbitt, J., held that: (1) misrepresentations made by pilot and crew members of aircraft in visa applications were material and justified probable cause belief by agents of the United States that aircraft's entry into the United States was in violation of statute relating to bringing in and harboring certain aliens; (2) Government raised a presumption of actual knowledge of the misrepresentations on the part of the claimant, which claimant failed to negate; and (3) defense of duress was unavailable to claimant where initial arrival of aircraft in the United States was result of planned and scheduled flight.

Aircraft forfeited.

* * *

Jonathoan Goodman, Asst. U.S. Atty., Miami, Fla., for plaintiff.

Ira Kurzban, Kurzban, Kurzban & Weinger, P.A., Miami, Fla., for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

NESBITT, District Judge.

THIS ACTION was tried before the Court. Upon the testimony and the evidence presented, the Court, pursuant to Rule 52(a), Fed.R.Civ.P., enters the following findings of fact and conclusions of law. In making these findings, the Court has considered letters rogatory, depositions, and documents introduced as well as the testimony at trial, and relies only upon those portions of the evidence that are relevant and material and presented by witnesses competent to testify. The Court has jurisdiction pursuant to 28 U.S.C. §§ 1345 and 1355.

FINDINGS OF FACT

This case involves a forfeiture action by the United States against One Lear Jet Aircraft, Serial No. 35A-280, Registration No. YN-BVO (Lear jet). The Claimant, Leybda Corporation (Leydba), has asserted ownership of the aircraft and challenges the validity of this forfeiture action. The Amended Complaint contains five counts. Count II was dismissed by Order of Court prior to the time of trial. During trial, the Government dismissed

Count III. The case is now before the Court as to Counts I, IV and V. Count I of the Complaint alleges the 1980 version of 8 U.S.C. § 1324 as a basis for forfeiture. This statute provided in pertinent part as follows:

> (a) any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise;
>
> any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs; provided, however, that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.
>
> (b)(1) any vessel, vehicle or aircraft which is used in the commission of a violation of subsection (a) shall be subject to seizure and forfeiture, except when—
>
> (A) the owner, master or other person in charge of such vessel, vehicle or aircraft, was not, at the time of the alleged illegal act, a consenting party or privy thereto.

Counts IV and V assert that forfeiture is also appropriate under 22 U.S.C. § 401(a) (1979) which provides as follows:

> (a) Whenever an attempt is made to export or ship from or take out of the United States any arms or munitions of war or other articles in violation of law, or whenever it is known or there shall be probable cause to believe that any arms or munitions of war or other articles are intended to be or are being or have been exported or removed from the United States in violation of law, the Secretary of the Treasury, or any person duly authorized for the purpose by the President, may seize and detain such arms or munitions of war or other articles and may seize and detain any vessel, vehicle, or aircraft containing the same or which has been or is being used in exporting or attempting to export such arms or munitions of war or other articles. All arms or munitions of war and other articles, vessels, vehicles, and aircraft seized pursuant to this subsection shall be forfeited.

Specifically, the United States alleges that the crewmembers of the Lear jet, with knowledge by Leybda, made material misrepresentations in their visa applications, thereby entering the United States in violation of 8 U.S.C. § 1324 and subjecting the Lear jet to forfeiture. Furthermore, the Government contends that the Lear jet was exported in violation of the export regulations located at 15 C.F.R. § 385.1 and 15 C.F.R. § 387.4.

The facts, as adduced at trial, indicate that on September 1, 1980, the Lear jet aircraft landed at Miami International Airport. At that time, the pilot, Simeon Delfin Espinosa (Espinosa), and two crewmembers, Jorge Hermengildo Toledo Infante (Toledo) and Luis Leonardo Herrera Altuna (Herrera), each presented Nicaraguan passports issued in their names to the United States Customs Inspectors. Each passport contained non-immigrant B-1 and D-1 visas issued by the United States Em-

bassy in Managua. The visa applications were submitted to United States authorities in Managua, Nicaragua, in April, 1980.

Upon arrival in the United States, all three crewmembers completed INS form I-94. I-94 forms, given to non-immigrant aliens to complete upon arrival in the United States, require that among other things, a non-immigrant alien provide his United States address. In the instant case, each crewmember claimed that he was a citizen of Nicaragua and that he had boarded in Managua, Nicaragua. Furthermore, each listed Cuba as their place of birth and provided their Nicaraguan passport numbers.

On September 2, 1980 the jet was flown to Fort Lauderdale-Hollywood International Airport for repairs. On September 5, 1980, agents of the Federal Bureau of Investigation (FBI) and the Immigration and Naturalization Service (INS) observed Espinosa, Toledo, Herrera and a fourth man, later identified as Oscar Vasquez, preparing the aircraft for departure from Fort Lauderdale airport. The agents interviewed the three crewmembers and briefly spoke to Vasquez. FBI Special Agent Duran testified at trial that Espinosa stated that he arrived in Miami on September 1, 1980 in order to repair the Lear jet and flew it to Fort Lauderdale on September 2 for the same reason.

During the September 5, 1980 airport interview, Espinosa presented a pilot's license issued to him by the Nicaraguan government. He further stated that the Lear jet was owned by a Panamanian company with which Oscar Vasquez was affiliated. Espinosa denied applying for a visa in Havana to pilot Cubana Airlines charter

flights to the United States. Both Toledo and Herrera also denied applying for a visa in Havana in 1979 and 1980 as Cubana Airlines crewmembers. The three crewmembers were arrested and charged with violating United States immigration laws and the Lear jet was seized.

In prior criminal procedures, each of the crewmembers was indicted on various counts of visa fraud in violation of 18 U.S.C. § 1546. Each crewmember ultimately changed his plea and pled guilty to one immigration violation, under 18 U.S.C. § 1546, of knowingly possessing a visa application which contained false representations. A United States Immigration Judge determined that Espinosa, Toledo and Herrera were admitted to the United States by presenting a visa obtained by filing a visa application misrepresenting material facts.

At trial, the Government introduced evidence of false or inconsistent statements made by each of the crewmembers in different visa applications and other government forms in support of its claim for forfeiture under Count I of the amended complaint. The discrepancies existing among the various visa applications are numerous. Several of the discrepancies are the result of misrepresentations made on the visa applications submitted in Managua on April 9, 1980 and resulted in the crewmembers admission to the United States in September of 1980. By way of illustration rather than limitation the Court finds that the following misrepresentations and discrepancies exist as to each of the crewmembers.

Espinosa. On June 26, 1979 Espinosa filed a visa application at the United States Interests Section in Havana, Cuba. In this application Espinosa stated that

he was a Cuban citizen employed by Cubana de Aviacion—the Cuban state government airline. In addition, he stated that he had resided in Cuba during the previous 34 years—his entire life. Espinosa, in a visa application submitted in Nicaragua on April 9, 1980, represented that he was a Nicaraguan national. In his visa application filed in Havana in June 1979, however, Espinosa represented himself as a Cuban national. His February 15, 1980 application for a Panamanian pilot's license, however, represents his nationality as Cuban. In his visa application filed in Managua, Espinosa denied ever making a prior visa application. This statement is in direct conflict with the fact that he submitted a visa application to the United States Interests Section in Havana. In his April 1980 visa application filed in Nicaragua, Espinosa represented himself as an employee of the Nicaragaun Department of Transportation. In contrast, his prior visa application represented that he was a crewmember of Cubana Airlines. When submitting the visa application to the United States Embassy in Managua, Espinosa represented that he had lived in Managua during the prior ten years. His visa application filed in Cuba the year before claimed that he had resided in Cuba during the previous 34 years. Furthermore, the visa application that Espinosa filed in Managua expressly asked him to indicate all countries he had lived in for more than six months during the past five years. Espinosa wrote Nicaragua, failing to indicate Cuba. The photograph and signature on each application appear to be of the same person.

Toledo. Toledo submitted two visa applications to the United States Interests Section in Havana. In the first application submitted on July 9, 1979, Toledo repre-

sented himself as a Cuban national who resided in Havana. In the second application filed on January 15, 1980, Toledo listed himself as a Cuban national residing in Havana. Toledo's April 9 application stated that he was a Nicaraguan national. However, in a visa application filed with the United States Interests Section in Havana on January 15, 1980, he represented that he was a Cuban national. Furthermore, Toledo's February 15, 1980 application for a Panamanian pilot's license stated that he was a Cuban national. In his visa application filed in Managua. Toledo denied ever making a prior visa application. As demonstrated by the Havana Interests Section visa applications introduced during trial, it is clear that Toledo had made two prior applications. In his April 1980 visa application filed in Managua, Toledo represented himself as an employee of the Nicaraguan Department of Transportation. In his January 1980 visa application filed in Havana, however, Toledo identified himself as a crewmember of Cubana Airlines. In the visa application filed in Managua, Toledo represented that he had resided in Nicaragua during the prior ten years. In contrast, the application he filed a few months earlier in Havana lists a Cuban address as his domicile. The photographs and signatures in the applications appear to be of the same person.

Herrera. Herrera also submitted two visa applications to the Interests Section in Havana. In the first, Herrera represented himself to be a Cuban national. In his second application, made on June 22, 1979, Herrera stated that he had lived in Cuba for 32 years—his entire life. This application expressly stated that he had been in the United States in 1978, as a crewmember for Cubana

Airlines. Herrera filed a third application at the Interests Section in Havana in July 1979, in which he again indicated he had been in the United States in 1978. Herrera's application submitted to United States authorities in Managua on April 10, 1980, represented that he was a Nicaraguan national. In the earlier applications filed in Havana, Herrera represented himself as a Cuban national. As did the others, Herrera denied making any prior visa applications. In the earlier visa applications made in Cuba, Herrera identified himself as an employee of the official Cuban government airline. In his April 1980 visa application in Managua, he represented himself as an employee of the Nicaraguan Department of Transportation. In the visa application filed in Nicaragua, he claimed that he had resided in Nicaragua during the previous six years. But in one of several visa applications presented the previous year to the United States Interests Section in Cuba, Herrera represented that he had resided in Cuba during the preceding 32 years. In addition, Herrera denied ever being in the United States in his April 1980 visa application submitted in Managua. The 1979 general declarations from Cubana Airlines list Herrera as a crewmember. In addition, Herrera expressly stated, in his July 4, 1980 application filed in Cuba, that he had been in the United States. The photographs in the different visa applications appear to be of the same person, but they are prints of the very same photograph. The signatures appear identical.

Based on the above-described discrepancies, the Government asserts that Espinosa, as pilot of the Defendant aircraft on September 1, 1980, knew that he and the two

crewmembers were not lawfully entitled to enter or reside within the United States because he knew that the visa applications contained false representations. Espinosa was in charge of the Defendant aircraft on September 1, 1980 and consented to, and was privy to, the immigration violations that he and his two crewmembers committed. In their Letters Rogatory testimony, Espinosa, Toledo and Herrera admit to signing the visa applications submitted to the United States Embassy in Managua, Nicaragua.

CONCLUSIONS OF LAW

Under Counts IV and V of the Complaint, the Government alleges that because Cuba was the ultimate consignee of the Defendant aircraft and because no export license was obtained as required by 15 C.F.R. § 385.1, the aircraft was exported in violation of 15 C.F.R. § 385.1 and 15 C.F.R. § 387.4. Without reaching the question of who was the ultimate consignee of the aircraft, the Court finds that the Government has failed to prove that Leybda Corporation had not obtained an export license for the Lear jet. Not one of the Government's witnesses testified that Leybda had failed to obtain the appropriate export license, nor did the Government introduce any documentary evidence attesting to Leybda's failure to obtain the appropriate licensing. Even the Government, in its Memorandum on Judicial Admissions, agrees that its reliance on Leybda's non-verified third party complaint which has been severed from this action is insufficient to establish the non-existence of an export license.

In support of Counts IV and V, the Government relies on the statement of Robert Duncan[1] that Management Jets International did not obtain an export license. However, even the Government has admitted in its Response to the October 19, 1984 Request for Admissions, that whether or not Management Jets International obtained an export license is entirely separable from the question of whether or not Leybda obtained an export license. Accordingly, the Court finds that the Government has failed to produce sufficient evidence in support of Counts IV and V of the Complaint. Therefore, judgment shall be entered in favor of the Claimant as to Counts IV and V.

Count 1 of the Complaint is brought under the prior 1980 version of 8 U.S.C. § 1324. In order to recover under this statute and be entitled to the forfeiture of the Lear jet, the Government must show probable cause for the institution of the suit. *United States v. One 1971 Chevrolet Corvette Automobile,* 496 F.2d 210, 212 (5th Cir. 1974). The Government predicates probable cause in this case upon the material misrepresentations made by Espinosa, Toledo and Herrera in the visa applications submitted to U.S. officials on April 9, 1980 in Managua, Nicaragua. As a result of these misrepresentations, the Government contends that the crewmembers were not lawfully entitled to enter the United States under 8 U.S.C. § 1182(a)(19) subjecting the Defendant aircraft to forfeiture under 8 U.S.C. § 1324.

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1. Robert Duncan is the President of Duncan Aviation, the parent company of Management Jets International. Management Jets is the company which sold the Defendant Lear Jet to Leybda Corp.

Initially, the Court finds that 8 U.S.C. § 1182(a)(19) applies to this case as the crewmembers made material misrepresentations in their visa applications of April 1980. Had the response required in the visa application been accurate, further action may have been taken and further investigation may have been made by U.S. Customs officials. For example, if the crewmembers had correctly listed their prior residence in Cuba in applying for a visa, officials might have considered the applications in a different light and at the very least conducted further inquiry. Even a cursory investigation would have revealed that Espinosa, Toledo and Herrera submitted prior visa applications as crewmembers for Cubana de Aviacion, the official Cuban government airline and that Toledo submitted a visa application in Havana as a Cubana Airlines crewmember as recently as three months before the Managua application. Similarly, officials could have determined that Toledo's visa, which was submitted in Havana, was issued less than two months earlier. Had government officials known that the crewmembers lived in Cuba and had submitted prior visa applications, an investigation into the relationship between the applicants and Cuba may have been commenced. Based on the foregoing, the Court finds that the misrepresentations were material under 8 U.S.C. § 1182(a)(19) and justified a probable cause belief by agents of the United States Government that the Defendant aircraft's entry into the United States on September 1, 1980 violated 8 U.S.C. § 1324(a).

The Court must next determine whether Leybda Corp. has successfully proven an absence of actual knowledge of the material misrepresentations and the violation of 8 U.S.C. § 1324(a). Once the Government demonstrates

probable cause, the burden shifts to the Claimant, whose responsibility it is to prove the absence of actual knowledge. *See United States v. Four Million, Two Hundred Fifty-Five Thousand,* 762 F.2d 895 (11th Cir. 1985). It is not the Government's burden to prove that the Claimant had actual knowledge. *Id.* The Court finds that the Claimant has failed to satisfy its burden as to the absence of actual knowledge. The Claimant presented no credible evidence that it was not aware of the crewmembers' unlawful entry into the United States. In fact, evidence was introduced during trial indicating that the Claimant knew about the visa applications submitted by the three crewmembers and was in fact acting in concert with them. The evidence established that Oscar Vasquez acted as Leybda's agent and was involved in all aspects of the purchase and operation of the Defendant Lear jet. Documents introduced during the course of the trial indicated that it was Vasquez who arranged to have the three crewmembers and the jet flown to the United States for repairs. As the Claimant produced no owner director or officer of Leybda, Oscar Vasquez is the only known agent of Leybda. The only evidence from a Leybda official is from Jacinto Obregon Sanchez whose name does not appear on any documents submitted to the Court. Despite Obregon's testimony in the Letters Rogatory received by this Court, the evidence indicates that Oscar Vasquez was the only individual acting on behalf of Leybda during the events which occurred prior to the seizure of the aircraft. The Court finds that the Government raised the presumption of actual knowledge which the Claimant failed to negate. *United States v. One 1975 Ford F-100 Pick-up Truck,* 558 F.2d 755, 756 (5th Cir.1977); *United States v. One 1971 Chevrolet Corvette Automobile,* 496 F.2d at 212.

The Claimant has asserted several defenses which merit only brief discussion. The Claimant asserts that it landed the plane in Fort Lauderdale on September 4, 1980 because of an emergency caused by a faulty fuel computer. In essence, the Claimant asserts that the Lear jet entered the United States under the duress caused by the faulty fuel computer. In order to establish the defense of duress, Leybda must show that the pilot and crewmembers flew the defendant Lear jet into the United States because

> (1) [they were] under an immediate threat of death or serious bodily injury,
>
> (2) [they] had a well-grounded fear that the threat would be carried out, and
>
> (3) [they] had no reasonable opportunity to escape.

United States v. Blanco, 754 F.2d 940 (11th Cir.1985).

The facts of the case, as adduced during trial, indicate that the immigration violations occurred during the September 1, 1980 landing of the Lear jet. The facts also showed that the jet arrived in Miami on September 1, as the result of a planned and scheduled flight from Cuba rather than as the result of a sudden emergency. Accordingly, the Court finds that the defense of duress is unavailable to the Claimant.

Leybda also asserts that 8 U.S.C. § 1324 is inapplicable to the circumstances surrounding the seizure of the Defendant Lear jet. Research has not revealed nor have the parties brought to the Court's attention, a case involving similar facts brought under 8 U.S.C. § 1324. Although this statute is penal in nature and requires strict construction, *see United States v. Washington,* 471 F.2d 402 (5th Cir.), *cert. denied,* 412 U.S. 930, 93 S.Ct. 2759, 37 L.Ed.2d 158

(1973); *see also Mayo v. United States,* 413 F.Supp. 160 (E.D.Ill.1976) (holding that statutes authorizing forfeiture must be construed with strictness), it is the view of this Court that the words of the statute are clear and unambiguous and therefore shall be given their literal and ordinary meaning, *United States v. Bryant,* 671 F.2d 450 (11th Cir.1982); *Smith v. Pingree,* 651 F.2d 1021 (5th Cir. 1981).

The Court finds that this case presents a situation where an aircraft was used to bring into the United States "an alien crewman . . . not lawfully entitled to enter or reside within the United States." 8 U.S.C. § 1324. The purpose of the statute is satisfied by the forfeiture of the Defendant Lear jet. Leybda has presented no case law in support of its theory that this statute applies solely to traditional "smuggling" cases. Indeed, the United States Court of Appeals for the Fifth Circuit has rejected this argument in *United States v. Washington,* upon 471 F.2d 402, 404 (5th Cir.), *cert. denied,* 412 U.S. 930, 93 S.Ct. 2759, 37 L.Ed.2d 158 (1973). Accordingly, the Court finds that 8 U.S.C. § 1324 applies to the facts of this case.

Finally, the Claimant asserts that because the three crewmembers possessed B-1 and D-1 visas but were admitted to the United States as B-2 immigrants, there was no violation of 8 U.S.C. § 1182(a)(19) and hence no justification for the forfeiture of the Defendant aircraft. The Claimant introduced evidence through an attorney specializing in immigration to support its assertion that a B-2 visa is entirely distinct from a B-1 visa and that a B-1 visa will not gain an immigrant admittance to the United States as a B-2 immigrant. Even assuming "expert testimony" was necessary to aid the court in making a deter-

mination as to the custom and practice of Customs officials in admitting or not admitting persons with certain types of visas, the Court finds in view of all the testimony that ordinarily a B-1 visa will not gain an immigrant admittance as a B-2 immigrant. However, the Court has also considered the testimony of the Customs Inspector who admitted the three crewmembers that he relied on the visas presented when admitting Espinosa, Toledo and Herrera and inadvertently admitted them as B-2 instead of B-1 immigrants. Because the Customs Inspector relied on the fraudulent visas presented by the crewmembers, the Court finds that a violation of 8 U.S.C. § 1182(a)(19) occurred subjecting the Defendant aircraft to forfeiture.

Based on the foregoing, the Court finds in favor of the Claimant as to Counts IV and V of the Amended Complaint and in favor of the Plaintiff as to Count I of the Amended Complaint. Accordingly, the Defendant Lear Jet Aircraft, Serial No. 35A-280, Registration No. YN-BVO, is hereby forfeited to the United States Government.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5938

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONE LEAR JET AIRCRAFT, Serial No. 35A-280, Registration No. YN-BVO,

Defendant,

LEYBDA CORPORATION,

Claimant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 23, 1987, 11 Cir., 1987, — F. 2d —).

(Filed March 2, 1987)

Before CLARK, EDMONDSON and KEITH*, Circuit Judges.

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* Honorable Damon J. Keith, U.S. Circuit Judge for the Sixth Circuit.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-6031-CIV-NESBITT

UNITED STATES
OF AMERICA,

Plaintiff,

vs.

ONE LEAR JET AIRCRAFT,
Serial No. 35A-280,
Registration No. YN-BVO,

Defendant.

_____/

ORDER

(Filed November 26, 1985)

THIS CAUSE came before the Court upon Claimant's Motion for New Trial or to Reopen Record. The Court has reviewed the Motion, the opposing memorandum filed by the government and other pertinent portions of the file, and is otherwise fully advised in the premises. Accordingly, it is hereby

ORDERED AND ADJUDGED:

Claimant's Motion is DENIED as untimely. This Court does not have jurisdiction to grant a new trial when the motion is not served within the ten day time limitation required by Fed.R.Civ.P. 59(b). As for the Rule 60 (b) motion to reopen the record, the Claimant's Motion is

DENIED. Not only does the motion raise an argument previously submitted to the Court, but the argument is legally insupportable. *See, e.g., Kassab v. Immigration and Naturalization Service,* 364 F.2d 806 (6th Cir. 1966); *Landon v. Clarke,* 239 F.2d 631 (1st Cir. 1957).

DONE AND ORDERED at Miami, Dade County, Florida this 25 day of November, 1985.

/s/ Lenore C. Nesbitt
U.S. District Judge

cc: Jonathan Goodman, AUSA
Ira Kurzban, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 81-6031-CIV-NESBITT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FINAL JUDGMENT OF FORFEITURE

ONE LEAR JET AIRCRAFT
Serial No. 35A-280,
Registration No. YN-BVO,

(Filed September 12, 1985)

Defendant.

_____/

THIS CAUSE came on for trial before this Court in July, 1985, and findings of fact and conclusions of law having been entered on September 11, 1985, it is hereby

ORDERED AND ADJUDGED that:

1. Judgment be and hereby is entered in favor of the Plaintiff, UNITED STATES OF AMERICA, and against the Claimant, LEYBDA CORPORATION, and the Defendant, ONE LEAR JET AIRCRAFT, Serial No. 35A-280, Registration No. YN-BVO.

2. The Defendant ONE LEAR JET AIRCRAFT, Serial No. 35A-280, Registration No. YN-BVO, is forfeited to the UNITED STATES OF AMERICA.

3. The Defendant ONE LEAR JET AIRCRAFT, Serial No. 35A-280, Registration No. YN-BVO, shall be

turned over to the United States Government for disposition according to law.

DONE AND ORDERED at Miami, Dade County, Florida this 12th day of September, 1985.

/s/ LENORE C. NESBITT
U.S. District Judge

cc. Jonathan Goodman, AUSA
Ira Kurzban, Esq.

Supreme Court, U.S.
FILED
JUL 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1725

In the Supreme Court of the United States

OCTOBER TERM, 1987

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO AND LEYBDA CORPORATION, S.A., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

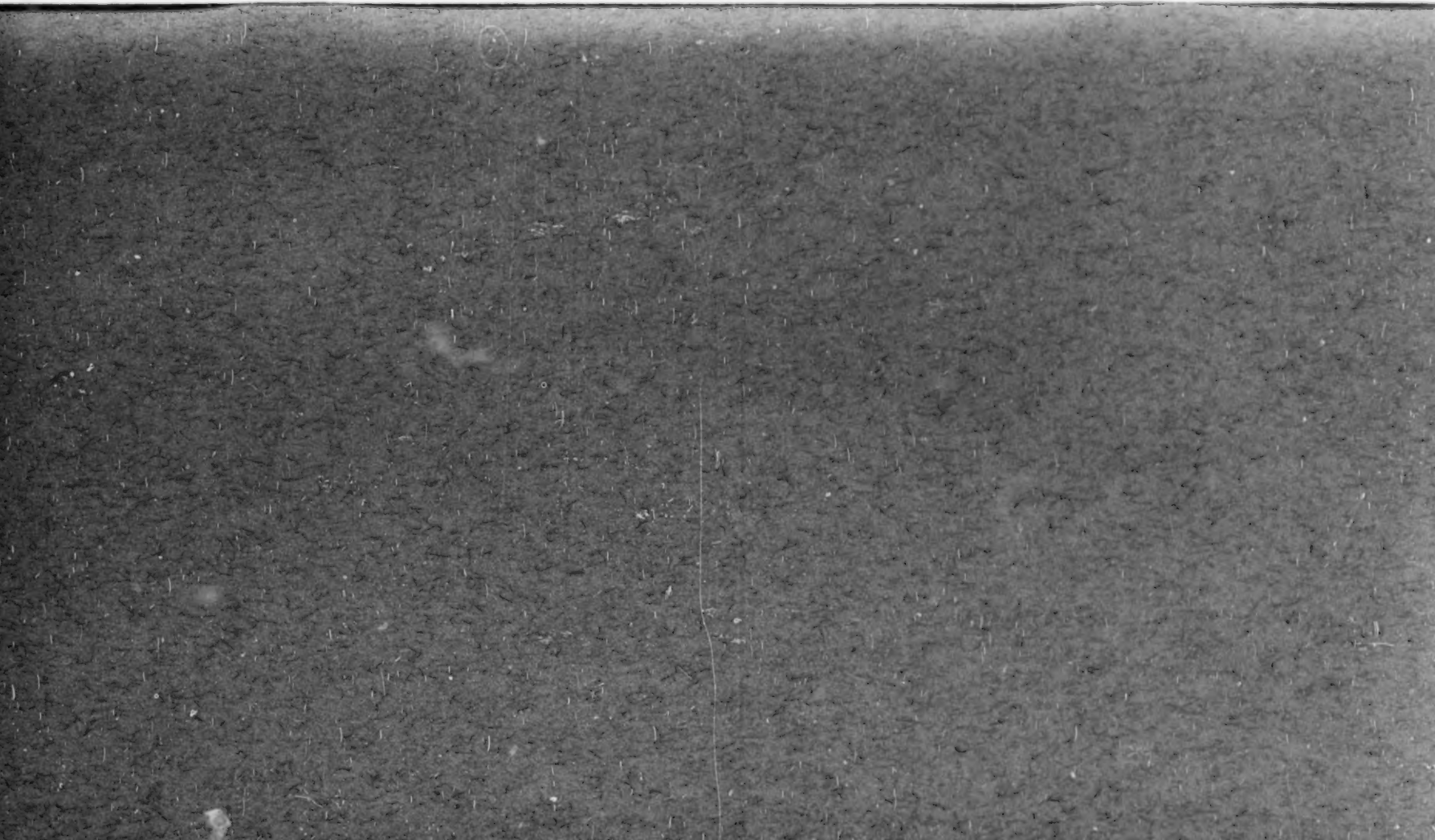
BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SAMUEL ROSENTHAL
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217



QUESTIONS PRESENTED

1. Whether misrepresentations made on a visa application were "material" within the meaning of 8 U.S.C. 1182(a)(19), warranting forfeiture of an aircraft used in violation of the statute.

2. Whether the misrepresentations in this case were sufficiently willful to warrant forfeiture.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1725

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO AND LEYBDA CORPORATION, S.A., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 808 F.2d 765. The opinion of the district court (Pet. App. 23-38) is reported at 617 F. Supp. 769.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1987. A petition for rehearing was

denied on March 2, 1987. The petition for a writ of certiorari was filed on April 24, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The government instituted this action for civil forfeiture under 8 U.S.C. 1324(b), alleging that crewmembers of the Lear jet at issue in this case had made material misrepresentations on their visa applications, within the meaning of 8 U.S.C. 1182 (a)(19). The district court held that the crewmembers had violated the immigration statutes by making the alleged misrepresentations. Accordingly, the court ordered the jet forfeited. The court of appeals affirmed.

1. The facts are summarized in the court of appeals' opinion (Pet. App. 1-5). Petitioner Leybda Corporation is a Panamanian subsidiary of a Nicaraguan corporation and, as the owner of the jet that is the subject of this action, challenges the forfeiture. Leybda purchased the jet in 1980 and used it as an air taxi to transport government officials. In the course of its travels in North and South America, the jet entered the United States eight to twelve times in the five-month period ending in August 1980.

On September 1, 1980, the jet again entered the United States, landing at Miami International Airport. There, the crewmembers completed immigration forms and supplied facially valid non-immigrant visas that had been issued by the United States Embassy in Managua. The crew members claimed that they were Nicaraguan citizens who had boarded the jet in Managua. They were then allowed to fly the jet on to Ft. Lauderdale.

BEST AVAILABLE COPY

An investigation subsequently disclosed that all three members of the jet's crew had made false statements in their visa applications.[1] The false statements concealed the following facts: (1) that the crewmembers had resided in Cuba during the period immediately preceding their visa applications; (2) that they had previously submitted visa applications to the United States Interest Section in Havana; and (3) that they had previously worked for Cubana de Aviacion, the Cuban national airline. Pet. App. 4-5, 13-14. All three crewmembers subsequently pleaded guilty to knowingly having possessed visa applications containing false statements, in violation of 18 U.S.C. 1546.

2. The district court ordered the jet forfeited because of the misrepresentations in the visa applications. The district court found that the misrepresentations were "material" since, had the applications contained accurate information, further investigation "may have been taken and further investigation may have been made by U.S. Customs officials" (Pet. App. 34).

The district court further found that petitioner Leybda did not qualify as an "innocent owner." The court found that petitioner had not sustained its burden of demonstrating an absence of "actual knowledge," and it went on to find that "no credible evidence [was presented] that [Leybda] was not aware of the crewmembers' unlawful entry into the United States" (Pet. App. 35). In fact, the court found, the evidence supported the contrary conclusion: that Leybda "knew about the visa applications submitted

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[1] The investigation was directed at determining whether the jet was actually being operated by the Cuban government (Pet. App. 3-4).

by the three crew members and was in fact acting in concert with them" (*ibid.*).

3. The court of appeals affirmed. It held that the district court's findings of willful misrepresentations by the crew members in their visa applications were not clearly erroneous. Pet. App. 11-12. Observing that there was "little doubt" (Pet. App. 14) about the matter, the court also sustained the lower court's findings that the misrepresentations were material, since truthful responses on the visa applications might have provoked a further investigation by United States officials (Pet. App. 12). The court went on to observe that the information concealed from officials responsible for issuing the visas related to a "significant area of inquiry," with the information "mislead[ing]" officials about an area of "potential significance in the decision to grant or deny the visa" (*id.* at 16-17). The court also affirmed the lower court's finding that petitioner Leybda did not lack actual knowledge of the visa fraud (*id.* at 19).[2]

ARGUMENT

1. Petitioners' initial argument is that the court of appeals erred in failing to apply the standard of materiality set forth by this Court in *Chaunt* v. *United States*, 364 U.S. 350 (1960). Noting that the correct interpretation of the *Chaunt* test is now before the Court in *Kungys* v. *United States*, cert.

---

[2] The court observed that petitioner Leybda had conceded at trial that it bore the burden of proof on whether it had actual knowledge of the visa fraud (Pet. App. 18). Although on appeal Leybda contested that allocation of the burden, the court of appeals disposed of the argument by noting that the government had offered sufficient evidence of actual knowledge to defeat petitioner's claim in any event.

granted, No. 86-228 (Nov. 10, 1986), petitioners ask this Court in the alternative to hold this case pending a decision in *Kungys*.

As we have stated in our brief in *Kungys*, we believe that the proper test for materiality under 8 U.S.C. 1451(a), a provision similar to 8 U.S.C. 1182(a)(19), requires only that the misrepresentation have the capacity to mislead the fact-finder responsible for passing upon the applicant's qualifications for a visa and/or citizenship. Stated differently, we urge that the materiality requirement can be satisfied even without a showing of ultimately disqualifying facts.

The court of appeals in this case affirmed the district court's findings that the misrepresentations were material, because if the applications had been accurate a further investigation may have been conducted regarding the relationship between the crewmembers and the government of Cuba. Pet. App. 12. Thus, under the interpretation of the materiality test we have advocated in *Kungys*, petitioners' claim would have to be rejected.

The court of appeals stated that it did not believe that the *Chaunt* test of materiality should necessarily apply where only the forfeiture of assets is involved, but the court expressed the view that if the *Chaunt* test does apply, the government's evidence would satisfy that test. See Pet. App. 15 n.5. Although, for this reason, the decision in *Kungys* may not be dispositive of the issue in this case, we believe that it is highly likely that the Court's treatment of the materiality issue will be enlightening with regard to the issue presented here. For example, if the Court agrees with our proposed definition of materiality for denaturalization cases, petitioners could not show

that they were prejudiced by the application of the similar definition employed by the court of appeals in this case. Petitioners presumably would not argue that they are entitled to prevail on their claim where the interest at stake is not denaturalization, but only the forfeiture of assets. Accordingly, because a decision on the standard of materiality to be applied under the immigration statutes might well resolve this case, we do not oppose the request that this case be held pending the decision in *Kungys*.

Petitioners also contend (Pet. 15-17) that certiorari should be granted to review whether there must be some evidence in the record showing how the particular misrepresentations would have affected the consular officials' decision whether to grant the visas or the admissibility of the crewmembers to this country. The evidence before the district court established that the crewmembers purported, in effect, to be Nicaraguan citizens with no continuing or official relationship to the government of Cuba, when in fact they were employees of the Cuban government. That evidence, together with the judicially noticeable fact of the strained relationship between the governments of the United States and Cuba, was sufficient to support the district court's finding that disclosure of the truth at the visa application stage might well have provoked an inquiry into the crewmembers' purpose for obtaining entry into this country and their eligibility for admission. As the court of appeals noted (Pet. App. 16), "[d]isclosure of the true facts on the visa applications involved in this case almost certainly would have affected the decision made in 1980 with regard to those applications by the United States Embassy in Managua." Peti-

tioners' fact-bound argument that this finding is erroneous does not warrant review by this Court.[3]

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Kungys* v. *United States*, No. 86-228, and disposed of in light of the decision in that case.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

SAMUEL ROSENTHAL
Attorney

JULY 1987

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[3] Petitioners also assert that the aircraft was not used for illegal purposes, arguing that only drug or alien smuggling satisfies the statutory forfeiture provision. Pet. 9. As the court of appeals noted (Pet. App. 9-11), however, the guilty pleas by the crew-members make it clear that the jet was used in the commission of immigration offenses, which carry criminal penalties. 8 U.S.C. 1324(b). In addition, petitioners contend that the courts below erred in ordering forfeiture without requiring any showing that the misrepresentations were made "willfully." While observing that the court of appeals purported to sustain the district court's factual findings on this question, petitioners nevertheless assert that no such finding had been made by the district court. Pet. 18. This fact-bound argument does not merit review by this Court, and in any event it lacks merit. Although the district court in its opinion forfeiting the jet did not explicitly refer to the false statements in the visa applications as "willful," that was clearly what the court found, as the court referred to the crewmembers' false statements as "misrepresentations" (Pet. App. 26, 28, 33, 34) and their visas as "fraudulent" (*id.* at 38).

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No. 86-1725

In the Supreme Court of the United States

OCTOBER TERM, 1987

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO AND LEYBDA CORPORATION, S.A., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1725

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280,
REGISTRATION NO. YN-BVO AND
LEYBDA CORPORATION, S.A., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

1. The government instituted this action for civil forfeiture under 8 U.S.C. (& Supp. IV) 1324(b), alleging that crewmembers of the Lear Jet at issue in this case had made material misrepresentations on their visa applications, within the meaning of 8 U.S.C. (Supp. IV) 1182(a)(19). Petitioner Leybda Corporation is a Panamanian subsidiary of a Nicaraguan corporation and, as the owner of the jet, challenged the forfeiture. The district court held that the pilot and crewmembers of the jet had violated the statutory scheme through the misrepresentations they made on their visa applications. Accordingly, the district court ordered the jet forfeited. The court of appeals affirmed the forfeiture judgment. 808 F.2d 765 (1987). In doing so, the court of appeals rejected the argument by petitioner Leybda Corporation that the lower

court erred by applying the wrong standard of materiality in determining whether the misrepresentations satisfied the statute. The court of appeals also found that it had jurisdiction to consider to matter even though the res in question, the Lear Jet aircraft, had been removed by the government to Mississippi and was therefore beyond the court's jurisdiction. Removal of the plane occurred only after Leybda failed to file a motion for a stay of judgment with the district court or a supersedeas bond with the court of appeals. In addition, no stay was in effect under the automatic stay provision, Fed. R. Civ. P. 62(a), which expired after ten days.

2. Subsequently, the panel opinion was vacated and the case ordered to be reheard before the court en banc. 831 F.2d 221 (1987). Upon reconsideration, which was limited to the jurisdictional issue, the court issued a published opinion on February 11, 1988. 836 F.2d 1571 (1988) (en banc). In that opinion the court observed that the government had initiated this action under 28 U.S.C. 1345 and 1355. The court found that there was no in personam jurisdiction over the parties because the action was solely in rem. As such, the court concluded that the government was free to remove the aircraft once the judgment became final and that there was no stay in effect preventing the government from taking that action. Because the res had been removed from the jurisdiction of the court, the en banc court held that it lacked jurisdiction to entertain Leybda's claim on the merits.

3. Petitioners filed their petition with this Court prior to the entry of the order of the en banc court vacating the panel opinion. Accordingly, the petition addresses only the panel's ruling with regard to the materiality of the statements leading to forfeiture of the aircraft. Because the court of appeals' judgment no longer rests on the court's materiality ruling, further review of that issue is no longer appropriate.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1988

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Supreme Court, U.S.
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No. 86-1725 (4)

In The

Supreme Court of the United States

October Term, 1986

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO, and LEYBDA CORPORATION, S.A.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH AND ELEVENTH CIRCUITS

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

Counsel:

BRUCE J. WINICK, ESQ.
University of Miami
School of Law
P.O. Box 8087
Coral Gables, FL 33124
(305) 284-3031

Counsel of Record:

IRA J. KURZBAN, ESQ.
Counsel for Petitioners
Kurzban Kurzban & Weinger, P.A.
2650 SW 27th Ave., 2nd Floor
Miami, FL 33133
(305) 444-0060

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or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Whether the United States by initiating an *in rem* forfeiture proceeding thereby submits itself to the *in personam* jurisdiction of the court for purposes of an appeal of the forfeiture?

2. Can the United States, as plaintiff in a forfeiture proceeding, destroy appellate jurisdiction and thereby prevent a property owner from obtaining review of a forfeiture judgment by removing the *res* from the district after a district court judgment is entered?

3. Whether the decision by the *en banc* court that it lacked jurisdiction in an appeal of the forfeiture of a $3.2 million Lear Jet, because the United States as plaintiff in the forfeiture action removed the aircraft from the district, conflicts with *Adam v. Saenger,* 303 U.S. 59 (1938), and the law of the Fifth Circuit Court of Appeals?

4. Whether the principle of *Griffin v. Illinois,* 351 U.S. 12 (1956), is offended where the United States forfeits a claimant's only asset, thereby rendering it impecunious and unable to post a supersedeas bond, and thereafter defeats appellate jurisdiction concerning the forfeiture by removing the *res* from the district?

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A. Opinions, orders, findings of fact and conclusions of law by the court whose decision is sought to be reviewed:

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OPINIONS BELOW

On February 11, 1988, the United States Court of Appeals for the Eleventh Circuit *en banc* entered a decision relating solely to its jurisdiction, finding it had no jurisdiction to consider Petitioner's appeal. (P.A. 45-57). On March 9, 1988, that court denied Petitioner's request for rehearing of its *en banc* decision (P.A. 79-80). The Eighth Circuit Court of Appeals on January 6, 1986, also dismissed for lack of jurisdiction Petitioner's appeal of the forefeiture taken in that Circuit after the *res* had been removed there. (P.A. 81). None of these opinions are reported.

———o———

PRELIMINARY STATEMENT

On April 24, 1987, Petitioner filed a Petition for Certiorari seeking review of the judgment of the Court of Appeals for the Eleventh Circuit on significant issues of forefeiture law that relate closely to the issues under consideration in *Kungys v. United States,* No. 86-228. The Petition is still pending before this Court. On October 2, 1987, the Court of Appeals for the Eleventh Circuit *sua sponte* granted rehearing *en banc,* thereby vacating the panel opinion that is the subject of the Petition for Certiorari. On February 11, 1988, the *en banc* court found it lacked jurisdiction over the forfeiture appeal because the government had removed the *res* from the district. This Supplement to the Petition for Certiorari raises several significant questions concerning the lower court's jurisdictional determinations. This Court should grant certiorari to consider the jurisdictional questions raised in this Supplemental Petition and should then consider the significant forfeiture law issues raised in the initial Petition.

———o———

SUPPLEMENTAL STATEMENT OF THE CASE

On January 19, 1981, the United States as plaintiff filed a forfeiture complaint in the United States District Court for the Southern District of Florida. It did not assert admiralty jurisdiction; instead it asserted juris-

diction pursuant to 8 U.S.C. § 1329 and 28 U.S.C. §§ 1345 and 1355. (R. 1-1; 2 P.C.A. 17; D.E. 1).[1]

The Plaintiff United States asserted that the "aircraft is forfeited" and requested that the court issue an order "to enforce the forfeiture" and to "deliver into the possession of the Immigration and Naturalization Service" the aircraft "and for such other and further relief as this Court may deem just and proper." (R. 1-7).

Plaintiff not only arrested the aircraft *in rem* (D.E. 3), but personally served the Defendant/Claimant Leybda Corporation ("Leybda") through its counsel, Richard Baron (D.E. 2, 8; 2 P.C.A. 67, 71). Leybda as a Defendant/owner answered the complaint. (D.E. 9; 2 P.C.A. 28-29, 30-40). Thereafter, and throughout the pretrial and trial portion of this case, Leybda was treated as a defendant. (*See, e.g.*, D.E. 7, 12, 52, 68, 75, 141). In its Order of October 12, 1982, the District Court specifically addressed this issue and found that "Leybda Corporation is viewed as a defendant in this cause." (Order of October 12, 1982, at D.E. 75; 2 P.C.A. 72-73).

On September 12, 1985, the District Court entered a judgment of forfeiture in favor of the government. (P.A. 23-38). After the entry of the adverse final judgment, Leybda submitted a motion for new trial to the District Court[2] and a motion to recover attorneys' fees and costs

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[1] In this Supplement to Petition for Writ of Certiorari the Record on Appeal will be referred to under the designation "R.-volume-page"; Petitioner's Appendix to Petition and Supplemental Petition before this Court will be referred to as "P.A."; Petitioner's Appendix to its Brief in the original Appeal in the Eleventh Circuit will be referred to as "P.C.A."; Petitioner's Appendix before the Eleventh Circuit *en banc* will be referred to as "2 P.C.A."; and Docket Entries will be referred to as "D.E.".

[2] The motion was based upon documents obtained from the Lear Jet crew demonstrating that the United States Embassy in Managua, Nicaragua had subsequently issued new visas to the crew members. The motion asserted that issuance of the new visas to the crew members after all alleged derogatory facts were known revealed beyond doubt that their original alleged misrepresentations could not have been material misrepresentations warranting forfeiture. (D.E. 345).

relating to the counts that it had prevailed on at trial. (D.E. 347, 348, 349). During the pendency of these motions and without explanation or justification, the government removed the aircraft to Missouri. Seventeen days after the aircraft had been removed to Missouri, the government responded to the pending motions without raising in its responses any question as to the court's continued jurisdiction. (P.A. 70-71; D.E. 351, 352, 353; 2 P.C.A. 75-103).

The judgment of the District Court was appealed by Petitioner's timely notice of appeal filed on October 11, 1985. (R. 10-346). Prior to filing the appeal, Leybda did not seek a stay of the transfer of the airplane because such a request would have been futile in view of Leybda's lack of assets to post the supersedeas bond[3] required by Fed. R. Civ. P. 62(d). (P.A. 58). *See also* Fed. R. Civ. P. 62(b).

Upon learning that the aircraft had been moved to the Eighth Circuit, Leybda filed a notice of appeal in that Circuit. (R. 10-355). The government vigorously challenged the jurisdiction of the Eighth Circuit, asserting that it had "no authority to entertain a motion relating to an appeal pending in another Circuit." (United States' Emergency Response in Opposition to Appellants' Emergency Motion to Stay Transfer or Sale, 2 P.C.A. 100-103). On January 6, 1986, the Eighth Circuit Court of Appeals dismissed Leybda's appeal for lack of Jurisdiction. (P.A. 81).

On January 23, 1987, a panel of the Eleventh Circuit Court of Appeals, following oral argument found that it had jurisdiction to hear the appeal. *United States v. One Lear Jet Aircraft*, 808 F.2d 765, 768-69 (11th Cir. 1987).

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[3] The record on appeal before the court below demonstrates unequivocally that Leybda had no assets to post a supersedeas bond. (P.C.A. 181-185; R. 7-243; R. 10-252 n.1). Thus, the extremely speculative supposition referred to in the third paragraph of a footnote in the majority's opinion below that Leybda may have had access to other assets, see P.A. 50 n.1 ¶ 3 ("as the government alleges . . . [I]f this allegation is true . . . ."), is totally without basis. See Leybda's Petition for Rehearing En Banc.

(P.A. 6-9). The court subsequently denied rehearing and rehearing *en banc* on Leybda's motion to review the merits of the panel opinion. (P.A. 39).

Leybda filed its petition for Certiorari on April 24, 1987. The Solicitor General on July 24, 1987, *agreed* with Leybda's position that the case should be held pending resolution of *Kungys v. United States*, No. 86-228, which was set for reargument. 107 S. Ct. 3258 (1987). Petitioner's Petition for Certiorari is pending before the Court at this time, and the Solicitor General has *not* challenged the Court's jurisdiction.

On October 2, 1987, seven months after the court of appeals denied rehearing *en banc*, the court *sua sponte* granted rehearing *en banc* solely on the question of jurisdiction, and vacated the panel opinion. 831 F.2d 221 (11th Cir. 1987) (P.A. 75-76); Letter from Clerk (P.A. 77-78).

On February 11, 1988, the Eleventh Circuit *en banc* in a 6-to-5 decision held that it lacked jurisdiction to hear Leybda's appeal because the removal of the aircraft by the government from the district destroyed the court's *in rem* jurisdiction. (P.A. 45-74). On February 24, 1988, Leybda petitioned for rehearing *en banc*, which was denied by the court on March 9, 1988. (P.A. 79-80).

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted To Consider Important Questions Concerning The Availability Of Appellate Jurisdiction In Forfeiture Proceedings.

The *en banc* Court below, by a 6-to-5 vote, held that jurisdiction over the appeal of a forfeiture action initiated by the government may be defeated by the simple expedient of the government's removal of the *res* from the judicial district. The majority below thereby permitted the Executive Branch to deprive the owner of a $3.2 million aircraft of any appellate review of the government's forfeiture thereof by removing the aircraft from the district

before an appeal could be filed. By viewing the issue solely through the lens of *in rem* jurisdiction, the court below overlooked the fact that by initiating a forfeiture proceeding the government thereby submitted itself to the *in personam* jurisdiction of the court. *See Adam v. Saenger*, 303 U.S. 59 (1938).

The significance of this jurisdictional issue is manifest. Not only will it recur frequently in forfeiture litigation,[4] but it can be anticipated that the decision of the court below will give the government an all-to-easy way to defeat appellate jurisdiction by removing the *res* from the district for no reason other than to obtain dismissal of an appeal.

Indeed, this principle would allow the government not only to frustrate appellate jurisdiction, but trial court jurisdiction as well. The government could do this by obtaining possession of the *res* through pre-judgment seizure upon filing of the forfeiture complaint, removing it from the district, and then asserting lack of jurisdiction in the district court in order to defeat a claimant's day in court. If jurisdiction over forfeitures can only be *in rem*, requiring presence of the *res* in the district, the government can thereby forum shop at will, or in the alternative, play a bizarre game of musical chairs with a claimant seeking to contest forfeiture.[5] This is an important question of federal law which has not been, but should be, settled by this Court.

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[4] For Fiscal Year October 1, 1985 to September 30, 1986 three thousand five hundred forty-six (3,546) civil forfeiture actions were filed in the federal district courts. For Fiscal Year October 1, 1986 to September 30, 1987 three thousand five hundred fifty-two (3,552) civil forfeiture actions were filed in the district courts. Telephone conversations with David Gentry, Statistical Analysis and Reporting Division of the Administrative Office of the United States Courts, March 10, 1988.

[5] Indeed this is precisely what the government did here on the appellate level. When Petitioner filed its notice of appeal in the Eighth Circuit Court of Appeals, where the *res* had been moved to, the government successfully opposed appellate jurisdiction there, and simultaneously opposed jurisdiction in the Eleventh Circuit.

The decision below applies antiquated and questionable principles of *in rem* admiralty jurisdiction in the context of forfeitures initiated by the government. As the dissent *en banc* noted, the majority resuscitated "an anachronistic and conceptually flawed rule of admiralty, and appl[ied] it to a modern forfeiture case where it does not belong." (P.A. 65). Whether the courts should apply hypertechnical *in rem* jurisdiction notions in modern day forfeiture proceedings presents a significant and recurring problem that this Court has never addressed.

Under Article III of the Constitution, the Congress is given plenary authority to define the jurisdiction of the appellate courts. The decision below in effect gives the Executive Branch the option to defeat Congress' judgment with regard to appellate jurisdiction through its unilateral action in removing the *res* in a forfeiture case. This holding raises grave concerns for the administration of justice, for the appearance of justice, and for the vitality of the principle of separation of powers. Certiorari should accordingly be granted to resolve these significant and recurring issues of federal jurisdiction.

II. The En Banc Court Of Appeals' Decision Conflicts With This Court's Decision In Adam v. Saenger, 303 U.S. 59 (1938), And Also Directly Conflicts With The Law In The Fifth Circuit Court Of Appeals.

The decision of the *en banc* court, rejecting appellate jurisdiction despite the initiation of the forfeiture proceedings by the government as plaintiff, conflicts with this Court's decision in *Adam v. Saenger* 303 U.S. 59 (1938). *Adam* recognizes the principle that where a party invokes the jurisdiction of a court, it thereby submits itself to the full *in personam* jurisdiction of that court. 303 U.S. at 67-68. In *Adam*, this Court found that a plaintiff, although a non-resident of the forum state, submitted himself to the jurisdiction of the court *in personam* for purposes of a cross-action (counter-claim) by initially invoking the jurisdiction of the court as plaintiff. This Court held that "[t]he plaintiff having, by this voluntary

act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence." 303 U.S. at 67-68. Because under the principle of *Adam v. Saenger*, the court of appeals had jurisdiction over the person of the government, it could order it to reconvey and return the *res* to the claimant, the relief sought on appeal, notwithstanding the absence of the *res* from the district.

The *en banc* court's decision also conflicts with the law of the Fifth Circuit, which has recognized the applicability of the principle of *Adam v. Saenger* in *in rem* admiralty cases. *Inland Credit Corp. v. M/T Bow Egret*, 552 F.2d 1148 (5th Cir. 1977). In *Inland*, the Fifth Circuit held that a plaintiff which had invoked the jurisdiction of the court could not claim that an appeal should be dismissed because the court failed to retain control over the *res*. Quoting *Adam*, the court concluded that "it is proper for us to exercise our jurisdiction *in personam* to correct any errors in the lower court's *in rem* adjudication." 552 F.2d at 1152.

Not only did the government in this case invoke the jurisdiction of the court in initiating the forfeiture proceeding, but it also continued to invoke that jurisdiction after the *res* had been removed by the custodian to another district. (D.E. 351-53, 362). In this respect, the court below's decision also conflicts with another decision of the Fifth Circuit, *United States v. An Article of Drugs Consisting of 4,680 Bales*, 725 F.2d 976 (5th Cir. 1984).

The decision of the court below applies hypertechnical and outmoded notions of *in rem* admiralty jurisdiction inappropriately in a forfeiture context in which the government as plaintiff had invoked the court's jurisdiction. In so doing it also conflicts in principle with *Shaffer v. Heitner*, 433 U.S. 186 (1977). In *Shaffer* this Court clearly rejected the rigid view of jurisdiction long associated with *Pennoyer v. Neff*, 95 U.S. 714 (1878), establishing instead that "the standard of fairness and substantial justice set

forth in *International Shoe* should be held to govern actions *in rem* as well as *in personam.*" 433 U.S. at 206. It is only through a strained legal fiction that the court's jurisdiction can somehow be said to disappear when the *res* in an *in rem* action is removed from the district, even though the parties having an interest in and control over the *res* are present and subject to the court's jurisdiction. Like the fiction on which *Pennoyer* was based, this one "supports an ancient form without substantial modern justification." *Shaffer,* 433 U.S. at 212. As a result, the fiction should not be employed to substitute for analysis, to mock reality and to perpetuate injustice. *See generally* L. Fuller, *Legal Fictions* 10, 70-71 (1967).

The majority below's view of *in rem* jurisdiction was also rejected by this Court in *Continental Grain Co. v. Barge FBL-585,* 364 U.S. 19 (1960). In *Continental Grain,* this Court recognized that an *in rem* action could be transferred to a district other than the one in which the *res* is situated, noting that "a fiction born to provide convenient forums should not be transferred into a weapon to defeat that very purpose." 364 U.S. at 23. In this case the *res* is still intact, has not been sold, is within the territorial jurisdiction of the United States, and is within the custody of the government, over which the court has *in personam* jurisdiction. As a result, principles of *in rem* jurisdiction should not be permitted to be perverted to transform a fiction designed to provide a convenient forum "into a weapon to defeat that very purpose." *Id.*

Thus, the *en banc* majority's opinion "offends fundamental principles of fairness, . . . represents a departure from common sense, . . . [and] is analytically flawed." (P.A. 58) (dissent of Vance, J., joined by Hatchett & Anderson, J.J.).

III. The En Banc Court's Decision Is In Conflict With Griffin v. Illinois, 351 U.S. 12 (1956), And Its Progeny.

In this case Leybda, the Claimant/Appellant, as a result of the forfeiture of its airplane by the United States,

was without financial resources to post a supersedeas bond as required by Fed. R. Civ. P. 62(d) for the obtaining of a stay pending appeal. (2 P.C.A. 181-85). In view of this lack of financial resources necessary to obtain a stay, the court below's holding that the government's removal of the *res* from the district defeats appellate jurisdiction over a forfeiture action also offends basic principles of Due Process and Equal Protection applied in *Griffin v. Illinois*, 351 U.S. 12 (1956), and its progeny.

Griffin held that under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, a state may not deny a free transcript to an indigent criminal defendant where the transcript is necessary for a direct appeal from his conviction. This Court concluded that "[t]here can be no equal justice where the kind of a trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S. at 19. *Griffin* has been followed in a long line of cases decided by this Court.[6]

These cases in the criminal context "have made clear that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." *Roberts v. LaVallee*, 389 U.S. at 42. The *Griffin* principle, which has been extended beyond the criminal process, *see Boddie v. Connecticut*, 401 U.S. 371 (1971), "stands for the proposition that a state cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons." *Ross v. Moffitt*, 417 U.S. 600, 607 (1974).

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[6] *See Gardner v. California*, 393 U.S. 367 (1969); *Roberts v. LaVallee*, 389 U.S. 40 (1967); *Long v. District Court of Iowa*, 385 U.S. 192 (1966); *Rinaldi v. Yaeger*, 384 U.S. 305 (1966); *Draper v. Washington*, 372 U.S. 487 (1963); *Douglas v. California*, 372 U.S. 353 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Coppedge v. United States*, 369 U.S. 438 (1962); *Smith v. Bennett*, 365 U.S. 708 (1961); *Burns v. Ohio*, 360 U.S. 252 (1959); *Eskridge v. Washington State Board of Prison Terms & Paroles*, 357 U.S. 214 (1958).

These Due Process and Equal Protection principles should apply as well here to a forfeiture involving a substantial asset—a $3.2 million airplane which represented virtually the entire assets of the corporation—particularly in view of the quasi-criminal nature of forefeitures. *See One Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 697, 702 (1965) ("the information, though technically a civil proceeding, is in substance and effect a criminal one"); *United States v. One 1936 Model Ford V8 Deluxe Coach*, 307 U.S. 219, 226 (1939).

The forfeiture context involved here presents not merely a party whose indigency renders it unable to pursue appellate rights; its indigency and resulting inability to pursue appellate rights is produced by the action of the government itself in seeking and obtaining the forfeiture of the company's only asset. Certiorari should accordingly be granted to consider whether the *Griffin* principle would be offended by a decision that the government, after rendering a company impecunious through its forfeiture action, may then defeat appellate jurisdiction concerning the forfeiture merely by the expedient of removing the *res* from the district.

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CONCLUSION

This case presents questions of fundamental importance concering the jurisdiction of federal courts in forfeiture proceedings. Certiorari should be granted to consider these significant jurisdictional issues never previously addressed by this Court, and to resolve a conflict between the decision below and the jurisdictional principles established in *Adam v. Saenger*, 303 U.S. 59 (1938), as well as the law of the Fifth Circuit. In addition, certiorari should be granted to resolve whether the principle of *Griffin v. Illinois*, 351 U.S. 12 (1956), is applicable in the quasi-criminal forfeiture context.

Respectfully submitted,

Bruce J. Winick
University of Miami
School of Law

Ira J. Kurzban, Esq.
Kurzban Kurzban and
Weinger, P.A.

UNITED STATES of America,
Plaintiff-Appellee,

v.

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO, Defendant,

Leybda Corp., Claimant-Appellant.

No. 85-5938.

United States Court of Appeals,
Eleventh Circuit.

Feb. 11, 1988.

Action was brought for forfeiture of aircraft. The United States District Court for the Southern District of Florida, No. 81-6031-CIV-LCN, Lenore Carrero Nesbitt, J., 617 F.Supp. 769, upheld forfeiture, and aircraft's owner appealed. The Court of Appeals, 808 F.2d 765, affirmed. Following vacation of opinion by full court, which ordered en banc reconsideration of in rem jurisdictional issue, 831 F.2d 221, the Court of Appeals, Johnson, Circuit Judge, held that removal of aircraft from jurisdiction destroyed in rem jurisdiction.

Appeal dismissed.

Vance, Circuit Judge, filed dissenting opinion in which Hatchett and Anderson, Circuit Judges, joined.

Clark, Circuit Judge, filed dissenting opinion in which Anderson, Circuit Judge, joined.

Edmondson, Circuit Judge, filed dissenting opinion.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, Chief Judge, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK and EDMONDSON, Circuit Judges.

JOHNSON, Circuit Judge:

This case involves a forfeiture proceeding initiated by the government against a Lear Jet under 8 U.S.C.A. § 1324 (b). The aircraft had been used to enter this country by persons who made material misrepresentations on their visa applications. Leybda Corporation intervened as a claimant to the plane, but after trial, the district court ruled that the aircraft was forfeited to the government. *United States v. One Lear Jet Aircraft,* 617 F.Supp. 769 (S.D.Fla.1985). Leybda did not file a stay of judgment with the district court or a supersedeas bond with the appellate court. Therefore, after the expiration of the automatic ten day stay provided by Fed.R.Civ.P. 62(a), the government removed the plane to a warehouse in Missouri. Leybda then filed a timely notice of appeal, and this Court affirmed the forfeiture judgment. *United States v. One Lear Jet Aircraft,* 808 F.2d 765 (11th Cir. 1987). The panel held that it had jurisdiction to entertain this appeal even though the aircraft had been removed from the Court's territorial jurisdiction. This opinion was vacated by the full Court, which ordered *in banc* reconsideration of the *in rem* jurisdictional issue. 831 F.2d 221 (11th Cir.1987). We now hold that, because removal of the *res* from a court's territorial jurisdiction destroys that court's *in rem* jurisdiction, *Pennington v. Fourth National Bank,* 243 U.S. 269, 37 S.Ct. 282, 61 L.Ed. 713 (1917), this Court does not have jurisdiction to hear Leybda's appeal.

The general rule of *in rem* jurisdiction is that the court's power derives entirely from its control over the defendant *res*. *Id.* at 272, 37 S.Ct. at 283; *L.B. Harvey Marine, Inc. v. M/V River Arc*, 712 F.2d 458, 459 (11th Cir.1983). Where an appellant fails to file a stay of judgment or a supersedeas bond, and the *res* is removed from the court's territorial jurisdiction, the appellate court does not have *in rem* jurisdiction. *Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361, 1362 (11th Cir.1982), *cert. denied*, 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983); *Parks v. B.F. Leaman & Sons, Inc.*, 279 F.2d 529, 532 (5th Cir. 1960). This Circuit has recently reaffirmed this traditional rule. *See Harvey Marine*, 712 F.2d at 459; *Taylor*, 683 F.2d at 1362.

In *Harvey Marine* and *Taylor*, this Court dismissed appeals for lack of jurisdiction where the prevailing party had removed the *res* and where the losing claimants failed to stay the execution of the district court's order. Recent cases in other circuits have reached the same result. *See, e.g., United States v. $79,000 in U.S. Currency*, 801 F.2d 738, 739 (5th Cir.1986) ("Where no supersedeas is filed or steps taken to supersede judgment and the Marshal surrenders custody, neither the district court nor the appellate court retains *in rem* jurisdiction"); *United States v. 66 Pieces of Jade & Gold Jewelry*, 760 F.2d 970, 973 (9th Cir.1985) ("Because forfeiture proceedings are *in rem*, the court's subject matter jurisdiction is dependent on its continuing control over the property"); *Bank of New Orleans & Trust Co. v. Marine Credit Corp.*, 583 F.2d 1063, 1068 (8th Cir.1978) ("Removal of the *res* from a court's jurisdiction, or distribution of a substitute *res*

deposited in the registry of the court, destroys *in rem* jurisdiction"). These cases demonstrate that the traditional *in rem* rule retains vitality.

In *Harvey Marine*, this Court dismissed an appeal as moot where the ship against which an *in rem* action had been brought departed the Court's jurisdiction after the district court dissolved the *in rem* arrest warrant. 712 F.2d at 459. Harvey Marine had filed an appeal from the district court's order dissolving the arrest, but it failed to request a stay of that order and it did not file a supersedeas bond. *Id.* at 458. This Court stated that it could not "proceed to adjudication" where the *res* was no longer within the Court's territorial jurisdiction. In response to Harvey Marine's argument that it was "fundamentally unfair not to adjudicate the merits of the case," the Court noted that there were "various methods to protect appellate jurisdiction in an *in rem* case," *id.* at 459 (*citing Bank of New Orleans*, 583 F.2d at 1068-69; *Parks*, 279 F.2d 529), and it implied that Harvey Marine was at fault for failing to employ any of these methods.

Other courts have stated this position more forcefully, holding that the losing claimant to the *res* is obligated to take some action to preserve the *res* so that the parties' rights to it could be adjudicated at the district and appellate courts. These courts impose a duty on the claimant to seek a stay of execution of the district court's judgment pending appeal, to file a supersedeas bond, or to take other action to preserve the *res*. *Bank of New Orleans*, 583 F.2d at 1068. *See also United States v. $57,480.05 in U.S. Currency and Other Coins*, 722 F.2d 1457, 1458-59 (9th Cir.1984). Under these circumstances, a claimant who

fails to act to preserve the *res* cannot complain when the appellate court dismisses his appeal for lack of *in rem* jurisdiction.

Taylor employs an analysis similar to that in *Harvey Marine*, and the cases reach similar results. In *Taylor*, crew members brought an action against their vessel to obtain their wages. The ship was seized and sold, but the proceeds were disbursed to priority lienholders. This Court noted that the crew members failed to seek a stay of the district court's order allowing disbursement of the funds; therefore, the *res* was not before the Court on appeal, 683 F.2d at 1362. Consequently, *in rem* jurisdiction was destroyed, rendering the crew's appeal moot. *Id.*

Our recent cases control the result in the case at bar. The present case involves a sequence of events which is similar to what occurred in *Taylor* and *Harvey Marine*. After trial below, the district court ordered the plane forfeited to the government. Leybda filed notice of appeal, but it failed to stay the district court's order.[1] Therefore,

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1. Judge Vance contends that the result in this case is egregious because Leybda had no funds with which to post a bond to stay the judgment. He states that "[h]ad [Leybda] been able to post a supersedeas bond, the appeal would have gone forward without jurisdictional question." Our reading of the record does not support this assertion. Nothing in the record suggests that Leybda ever indicated to the trial court that it was not moving for a stay *because* it had no assets with which to post a bond. Moreover, a review of the record does not suggest that Leybda would have posted a bond even if it had sufficient assets.

In Leybda's reply brief submitted to the panel of this Court, Leybda stated that it "did not need to seek a stay

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the judgment became final ten days after the court issued its decree, and the government was free to remove the plane from this Court's jurisdiction. That removal destroyed *in rem* jurisdiction.[2]

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because the court had continuing *in personam* jurisdiction. Moreover, a motion for a stay would have been futile. Leybda has no assets to post a stay." Appellant's Reply Brief at 6. In its *in banc* brief, Leybda reasserted the futility of seeking a stay. Appellant's *In Banc* Brief at 17. The language employed in these briefs demonstrates that impecuniousness was not *the reason* behind Leybda's failing to seek a stay. Instead, we find that Leybda's initial statement that it believed that it "did not need to seek a stay" explains Leybda's failure to take action.

In addition, the record is not clear on the issue of Leybda's access to funds. Leybda cites a corporate officer's affidavit as proof that the corporation's only major asset was the Lear Jet. R 7-243. However, the government alleged that Leybda was a sham corporation established as a commercial cover for the Cuban government. R 10-252 n. 1. If this latter allegation is true, Leybda may have had access to Cuban government funds. Moreover, this may explain how Leybda's attorney will be recompensed for the more than $41,000 worth of costs and fees he had incurred on behalf of this defunct corporation. See R 10-348 & 349.

2. Leybda asserts that the government's removal of the aircraft was improper because it was done solely to eliminate this Court's *in rem* jurisdiction. Accidental, fraudulent, or improper removal of the *res* does not destroy *in rem* jurisdiction. *The Rio Grande*, 90 U.S. (23 Wall) 458, 23 L.Ed. 158 (1874). However, after the expiration of the automatic ten day stay provided in Fed.R.Civ.P. 62(a) and absent a stay pending appeal, a prevailing plaintiff is free to execute a judgment in his favor even though the defendant is pursuing an appeal. *See United States v. Verlinsky*, 459 F.2d 1085, 1089 (5th Cir. 1972).

In the present case, Leybda did not request a stay, and neither the district court nor this Court stayed the judgment

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In light of the in rem jurisdictional rule, the only way in which Leybda might avoid dismissal of its appeal is to fit this appeal within the Court's *in personam* jurisdiction. Precedent from the predecessor to this Court holds that when an original action was brought *in rem* and *in personam*, the court retained jurisdiction even after the *res* was removed from the jurisdiction. *Inland Credit Corp. v. M/T Bow Egret*, 552 F.2d 1148 (5th Cir.1977). Therefore, this Court must determine whether *in personam* jurisdiction existed in this case.

One might argue that jurisdiction in this case was not limited to *in rem* jurisdiction. For example, 28 U.S.C.A. § 1345 provides that:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

In addition, 28 U.S.C.A. § 1355 provides that:

> The district court shall have original jurisdiction, exclusive of the courts of the states, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under Section 1582 of this title.

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sua sponte. Thus, ten days after the district court issued its decree, the government was entitled to do what it wished with the jet. *See $79,000*, 801 F.2d at 740 (The government's removal of forfeited property after the expiration of the ten day stay did not fall within the *Rio Grande* exception where the losing claimant failed to stay the district court's judgment). In this situation, the removal of the aircraft to Missouri was not improper.

In its forfeiture complaint, the government alleged that 28 U.S.C.A. §§ 1345 & 1355 provided the district court with jurisdiction, and the district court proceeded with the complaint on that basis. *One Lear Jet*, 617 F.Supp. at 771. At first glance, Section 1345 (jurisdiction where the United States is a plaintiff) may be read to provide a jurisdictional basis that is independent of the presence of the *res*.[3]

However, a closer examination of these sections indicates that they vest the district courts with subject matter jurisdiction over forfeitures under 8 U.S.C.A. § 1324. This is irrelevant to the question of whether the panel had *in rem* or *in personam* jurisdiction to decide this appeal. In addition, the statute governing forfeitures under the customs laws suggests that these statutes do not supply an independent jurisdictional basis. In part, the customs laws state that, "the storage of property outside the judicial district or customs collection district in which it was seized shall in no way affect the jurisdiction of the court which would otherwise have jurisdiction over such property." 19 U.S.C.A. § 1605. The legislative history of Section 1605 states that the statute was necessary to modify the traditional rule that the *res* "remain in the judicial district of seizure in order that the district court may have

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3. The only statutory provision which requires the *res* to be before the court is 28 U.S.C.A. § 1395(b), which provides:

> A civil proceeding for the forfeiture of property may be prosecuted in any district where such property is found.

However, this section concerns venue, not jurisdiction. Therefore, it does not limit a court's authortiy to adjudicate forfeitures under Section 1324.

jurisdiction when condemnation proceedings are instituted." 1954 U.S. Code Cong. & Admin. News 3900, 3906. The provisions of Title 28 discussed above were in effect when Congress adopted Section 1605. If those provisions were intended to eliminate the traditional requirement that the *res* be within the territorial jurisdiction of the court, Section 1605 was unnecessary. Obviously, the drafters of Section 1605 did not subscribe to this view.[4]

Although there is no statutory basis on which to assert that this Court has *in personam* jurisdiction, a limited exception to the *in rem* rule allows a court to retain jurisdiction even though the *res* is no longer within the court's territorial boundaries.[5] Specifically, where there is an

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4. In the exercise of its regulatory powers, Congress could modify the requirement that the *res* be within the court's territorial jurisdiction, as long as the claimants were not denied due process. In fact, one district court has stated that, in the absence of a contrary congressional intent, the territorial jurisdiction of a court in a forfeiture proceeding under 28 U.S.C.A. § 1355 is limited only by the territorial limits of the nation and the venue requirements of 28 U.S.C.A. § 1395. *United States v. One 1974 Cessna Model 310R Aircraft*, 432 F.Supp. 364, 368 (D.S.C.1977). There is no support for this conclusion and we decline to adopt it, especially in light of the legislative history to 19 U.S.C.A. § 1605.

5. Judge Clark's dissent quotes from *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 80 S.Ct. 1470, 4 L.Ed.2d 1540 (1960), to support the proposition that the absence of the *res* should not defeat this Court's jurisdiction. However, as Judge Clark notes, *Continental Grain* involved an action which had been brought both *in rem* and *in personam*. There was an "interface" of the two types of jurisdiction; therefore, the Court could maintain *in personam* jurisdiction over the parties even after the *res* was removed from the jurisdiction. Reliance on *Continental Grain* is unavailing in the present case where such an interface of *in rem* and *in personam* jur-

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"interface of *in rem* and *in personam* jurisdiction," a court may properly exercise broad *in personam* power over the parties to the *in rem* action. *Inland Credit*, 552 F.2d at 1152. However, precedent in this Court provides little support for the claim that Leybda's appeal falls within this limited category of exceptions.

Factually, *Inland Credit* is different from the present case. In *Inland Credit*, a ship mortgagee brought an *in rem* action against the ship *and* an *in personam* action against the ship's owner. By so doing, the plaintiff invoked both types of jurisdiction. In *One Lear Jet*, the government never invoked *in personam* jurisdiction when it brought suit; it sued the plane, not the purported owner who later intervened.[6]

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isdiction does not exist. In this case, the Court cannot assert *in personam* jurisdiction over the government because the action was solely *in rem*. We recognized this in *Taylor* where we dismissed an *in rem* action on appeal but noted that, if "this case also involved claims *in personam*, jurisdiction might still lie," 683 F.2d at 1362 n. 2. It follows from this comment that there is no basis for *in personam* jurisdiction when an action does not involve *in personam* claims. This is the situation here.

6. Judge Vance accuses the majority of misreading *Inland Credit* because the *Inland Credit* Court stated that it was "undeniable that [the plaintiff] Inland was subject to this court's *in personam* jurisdiction." However, Judge Vance fails to indicate that the Fifth Circuit had provided two reasons for finding *in personam* jurisdiction in *Inland Credit*. In two sentences just prior to the statement quoted by Judge Vance, the Court emphasized that (1) Inland had filed the suit both *in rem* and *in personam*, and (2) that Inland had appealed to the Fifth Circuit in an attempt to recapture a part of another party's *in personam* recovery. 552 F.2d at 1152. From this, the Court concluded that it had *in personam* jurisdiction over Inland. *Id.* However, this does not mean that an appellate court has *in personam* jurisdiction over a plaintiff who merely brings an *in rem* action in the district court.

Other cases which embody exceptions to the *in rem* jurisdictional rule are also distinguishable. In *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir.1978), a Florida corporation sued for possession of artifacts from a sunken ship located partially within and partially outside the territorial waters of the United States. The United States intervened in the district court and appealed summary judgment in the corporation's favor, arguing that the district court lacked *in rem* jurisdiction to determine the rights of the parties. The Court held that by intervening as a party defendant/claimant, and by stipulating to the district court's admiralty jurisdiction, the United States had waived the requirement that the *res* be before the court. *Id.* at 335. Again, this case is different from *One Lear Jet* because jurisdiction in *One Lear Jet* was based solely on the *res;* the government did not consent to the court's *in personam* jurisdiction.[7] It merely brought a forfeiture action against the aircraft.

This Court's precedents do not allow us to assert *in personam* jurisdiction over the government in this case. Such a holding would be an unwarranted extension of the limited exceptions which find *in personam* jurisdiction in

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7. In criticizing the majority's discussion of *Treasure Salvors,* Judge Vance ignores the fact that the parties in *Treasure Salvors* consented to the district court's exercise of *in rem* jurisdiction, but the losing party subsequently challenged that court's jurisdiction on appeal. The case at bar is different because the government is challenging this Court's jurisdiction, to which it never consented. Subsequent cases have deemed this consent issue to be significant. *See Harvey Marine,* 712 F.2d at 459; *Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel,* 640 F.2d 560, 566 (5th Cir. Mar. 1981) ("*Treasure Salvors III*").

certain forfeiture proceedings. Moreover, we reject the notion that the United States consented to *in personam* jurisdiction by invoking the district court's *in rem* jurisdiction initially.[8] To hold that the government "consented" to *in personam* jurisdiction would be tantamount to deciding that a court has *in personam* jurisdiction over any participant in an *in rem* proceeding. This does not comport with the traditional analysis of *in rem* jurisdiction.[9]

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8. *Adam v. Saenger*, 303 U.S. 59, 58 S.Ct. 454, 82 L.Ed. 649 (1938), provides no support for the proposition that the government consented to the personal jurisdiction of the court simply by bringing this action. *Adam* held that the Fourteenth Amendment allows states to authorize the service of process of a defendant's counterclaim (referred to as a cross-complaint in *Adam*) upon a plaintiff's counsel of record as a condition of allowing the plaintiff access to a state court. *Id.* at 67-68, 58 S.Ct. at 458. It does not state that *in personam* jurisdiction exists simply because a plaintiff brings a claim *in rem*. At best, *Adam* supports a holding that the government would be subject to an *in personam* counterclaim brought by Leybda against the government. In the present case, no such counterclaim was filed. In November 1983, Leybda filed a pleading in response to the government's amended complaint. This pleading was styled "Amended Answer, Affirmative Defenses and Cross-Claim," and it included a third party cross-claim against Management Jets International. Leybda's third party action was severed from this *in rem* action and transferred to district court in Nebraska. R3-137. The claim was subsequently dismissed. Appellant's *In Banc* Brief at 3. This cross-claim was a different lawsuit from the government's *in rem* complaint; therefore, it cannot provide *in personam* jurisdiction over the government in the case at bar.

9. A recent Fifth Circuit opinion held that a "substitute basis of *in personam* jurisdiction" existed in a forfeiture action brought by the government against a drug. *United States v. An Article of Drug Consisting of 4,680 Pails, More or Less,*

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In sum, this Court lacks *in rem* jurisdiction to hear this appeal because the *res* had been removed from the jurisdiction at the time of the appeal. In addition, the Court does not have *in personam* jurisdiction over the parties because the action was solely *in rem*. Because this Court lacks jurisdiction to hear this appeal, it cannot entertain Leybda's claims on the merits. Accordingly, the appeal is DISMISSED.

VANCE, Circuit Judge, dissenting, in which HATCHETT and ANDERSON, Circuit Judges, join:

I concur in Judge Clark's dissent. I write separately to accent a few points I consider particularly important.

The question that divides the in banc court involves only the right of appeal. Because the panel correctly decided the merits of the case the outcome is not affected. In addition, my views are not in any way critical of the

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Each Pail Consisting of 60 Packets, 725 F.2d 976, 982 (5th Cir.1984). In that case, the manufacturer intervened and judgment was entered in its favor. Subsequently, the drug was released to the manufacturer who removed it from the district. After the government's motion for a new trial was granted, the manufacturer moved to dismiss for lack of *in rem* jurisdiction. However, the court held that it had a "substitute basis" of jurisdiction because the manufacturer had voluntarily appeared before the court to oppose the new trial motion but had not contested the *in rem* jurisdiction of the court at that time. *Id.* at 984.

As far as *An Article of Drug* is indistinguishable from the present case, we decline to follow it because precedent in this Circuit does not support this holding. We refuse to supply a "substitute basis" of jurisdiction in order to expand this Court's jurisdiction, especially where Leybda could have preserved the Court's *in rem* jurisdiction simply by filing a supersedeas bond.

government because of its removal of the aircraft from the Southern District of Florida. Because the judgment of forfeiture was neither superseded nor stayed, the government clearly had a right to remove the aircraft and dispose of it. Finally, my dissent in no way impinges on the activities of federal officials in their war against narcotics importation. I take issue solely with the majority's elimination of the right of appeal.

The majority opinion is disturbing on three different levels. In an important respect it offends fundamental principles of fairness. It also represents a departure from common sense. Finally, it is analytically flawed. Although in some circumstances courts may depart from principles of fairness and common sense, such a departure in this case is unjustified and unsupported by the law of forfeiture and admiralty.

1.

The claimant-appellant was unable to supersede the forfeiture judgment because it lacked the funds to do so. Had it been able to post a supersedeas bond, the appeal would have gone forward without jurisdictional question. Federal law and rules of procedure provide that a judgment may be appealed without any supersedeas bond. Here, however, the claimant is being deprived of that important right because of its impecunious state.

To my mind the egregiousness of the result is magnified because this is a forfeiture case—a penal proceeding wherein strict construction of authorizing statutes has been required almost as long as construction itself. As the Supreme Court stated in another era, when alcohol

rather than narcotics was the target of law enforcement: "Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law." *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226, 59 S.Ct. 861, 865, 83 L.Ed. 1249 (1939). Forfeiture actions are unique in that they are the only proceedings where the government may confiscate private property on a mere showing of probable cause. For this court to eliminate the right of appeal, the most important safeguard against abuse, is indeed a drastic step.

I do not assert that such an unfair result is without parallel. I do urge, however, that deprivation of important, indeed fundamental, rights because of impecuniousness alone should rest on compelling imperatives and not on sophistical hair-splitting.

2.

The United States initiated this proceeding in the United States District Court for the Southern District of Florida and thereby invoked the jurisdiction of a court of the United States. The majority holds that the United States can thereafter take the forfeited chattel out of the district and thereby defeat the jurisdiction of a United States court because of the United States court's inability to enforce a judgment against the United States.

It is not asking too much of courts to suggest that their decisions, whenever possible, should harmonize with ordinary common sense. With deference to my esteemed colleagues in the majority, their decision fails to do so.

3.

The majority's analysis is flawed because the majority misreads binding precedent and misapplies principles of

admiralty law in this forfeiture case. Because I believe we have had *in personam* jurisdiction over the United States from the instant the government invoked the jurisdiction of the federal courts to initiate the forfeiture proceedings, I dissent from the majority's dismissal of this appeal.

As Judge Clark's dissent points out, the majority's reasoning that removal of the *res* from the district destroyed this court's jurisdiction to hear claimant's appeal is based on a withering legal fiction in admiralty law that personified the ship. The traditional approach conceived of the ship as "the offending thing," which allowed actions directly against the ship. *See* G. Gilmore & C. Black, *The Law of Admiralty* 589-94 (2nd ed. 1975). The fiction of a ship's personality began as a literary theme, and reached a height of popularity near the turn of the century. *Id.* at 616. The fiction has been criticized severely during the past thirty years.[1] The Supreme Court has noted that it has been attacked as archaic, irrational, atavistic and an animistic survival from remote times. *Continental Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 23, 80 S.Ct. 1470, 1473, 4 L.Ed.2d 1540 (1960).

The majority's resort to this legal fiction as a principle of decision to resolve this appeal is disturbing enough.

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1. Since World War II the courts and commentators have been in comfortable agreement that the personification of the ship is and always has been merely a legal fiction, is not and never has been a principle of decision. Abandonment of the fiction would seem to have been a clear gain for legal thought.

G. Gilmore & C. Black, *The Law of Admiralty* 616 (2nd ed. 1975) (footnote omitted).

See G. Gilmore & C. Black, *supra,* at 616. But to utilize a defective legal fiction to essentially cut off any right of appeal for appellant is inexcusable. *See supra* Part 1.

As the doctrine of personification of the ship loses force, so should the rules which rest on it. G. Gilmore & C. Black, *supra,* at 804-05. Among the many such rules which courts have begun to jettison is the rule that the presence of the *res* within the jurisdiction of the court is an absolute prerequisite to the court's jurisdiction. *See Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel (Treasure Salvors I),* 569 F.2d 330, 334 & n. 4 (5th Cir.1978); 7A J. Moore & A. Pelaez, *Moore's Federal Practice* ¶ E.05, at E-203, E-207 (3rd ed. 1983); *see also United States v. An Article of Drug,* 725 F.2d 976, 982 (5th Cir. 1984) (in recent years Fifth Circuit has allowed certain *in rem* actions to continue despite absence of the *res*); *cf. Trans-Asiatic Oil Ltd. v. Apex Oil Co.,* 804 F.2d 773, 779 (1st Cir.1986) (court's jurisdiction in maritime attachment proceeding is not wholly circumscribed by the presence and amount of the attachment).

The majority compounds the problem by misapplying an already shaky admiralty rule to the facts of this case. The jurisdictional issue in this case involves the United States, not the claimant Leybda. The plaintiff United States, after initially invoking the jurisdiction of the federal courts and then removing the *res* from the district, now claims lack of subject matter jurisdiction in order to defeat claimant's attempt to appeal to this court. This is the exact opposite of what usually occurs in *in rem* cases, where the defendant ship stealthily absconds from port and leaves the plaintiff with no *res* from which to collect.

In the usual *in rem* case the issue then becomes whether the plaintiff may establish *in personam* jurisdiction of the owner of the *res* once the *res* has been removed from the district. *See, e.g., Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361, 1362 & n. 2 (11th Cir.1982), *cert. denied*, 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983); *Treasure Salvors I*, 569 F.2d at 333-35; *Inland Credit Corp. v. M/T Bow Egret*, 552 F.2d 1148, 1151-52 (5th Cir.1977). In this case the issue is whether the defendant may establish *in personam* jurisdiction over the instigator of the *in rem* action, the plaintiff.

The question almost answers itself. Because it is rare that the plaintiff commencing an action *in rem* turns around and contests the jurisdiction of the court, there is little authority directly on point. In *Treasure Salvors I* the United States intervened in an action for confirmation of title to the sunken wreck of a 17th Century Spanish vessel. The government also counterclaimed and asserted title to the wreck. The Fifth Circuit held that by intervening in the plaintiff's *in rem* action and filing a counterclaim asserting a property right in the underwater *res*, the United States waived the requirement that the *res* be present in the territorial jurisdiction of the court. 569 F.2d at 335.

In this case the United States has done more than intervene in an existing *in rem* action. The United States instigated the action.[2] Having submitted itself to the jur-

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2. The majority states that the government did not intervene in this case, it "*merely* brought a forfeiture action." With due respect I think the majority has it backwards. I consider bringing an action just as jurisdictionally significant as intervening into an existing one, if not more so.

isdiction of the court, the government should not be allowed to escape "through its subsequent jurisdiction exceptions" to claimant's appeal. *Savas v. Maria Trading Corp.*, 285 F.2d 336, 341 (4th Cir.1960). Indeed in other cases the government has argued successfully that it has personal jurisdiction over the owner of the *res* even after the *res* has disappeared. *See, e.g., United States v. Articles of Drug*, 818 F.2d 569, 571 (7th Cir.1987).

The Fifth Circuit in *Inland Credit Corp.* faced an almost identical issue. In that case the plaintiff, having received the proceeds of the sale of defendant ship, argued that the court lacked jurisdiction to hear the appeal of two intervenors who were denied a share of the proceeds by the district court. The court rejected the plaintiff's argument, noting that it amounted to the proposition that there can be no appeal from a distribution order once the proceeds have been disbursed. 552 F.2d at 1151. The court explained that it had *in personam* jurisdiction over the plaintiff because the plaintiff "by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court. . . ." *Id.* at 1152 (quoting *Adam v. Saenger*, 303 U.S. 59, 67-68, 58 S.Ct. 454, 458, 82 L.Ed. 649 (1938)). The United States in this case similarly has submitted itself to the jurisdiction of the court by demanding justice from the defendant in this forfeiture action.[3]

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3. The majority misreads the *Inland Credit* opinion, or at least does not read all of it. The majority reasons that because the plaintiff Inland Credit filed suit both *in rem* and *in personam*, the court continued to have jurisdiction over the ship's owner even after the *res* had been distributed. Therefore, the majority concludes, because the United States

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The majority places particular emphasis on *L.B. Harvey Marine, Inc. v. M/V "RIVER ARC"*, 712 F.2d 458 (11th Cir.1983), and *Taylor v. Tracor Marine, Inc.*, 683 F.2d 1361 (11th Cir.1982), *cert. denied* 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983), concluding that these cases "control the result in the case at bar." In addition to the distinguishing features noted in Judge Clark's dissent, I consider it particularly important that the cases relied on by the majority involved the converse of the issue in this case. In *Harvey Marine* the ship had left the jurisdiction and the plaintiff-appellant was trying to assert jurisdiction over the ship's owners. *See* 712 F.2d at 458-59. In *Taylor* the *res* had been distributed and the plaintiff-appellant was trying to assert a similar jurisdictional claim. 683 F.2d at 1362.[4] Neither case had anything to do with the court's jurisdiction over the *plaintiff*. Thus these cases are distinguishable, if not wholly inapplicable.[5]

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"never invoked *in personam* jurisdiction [over Leybda, the owner of the airplane] when it brought suit," the court lost jurisdiction once the *res* was removed from the district.

The issue in this case, however, is not what kind of jurisdiction exists over the *defendant* owner of the *res*, but what kind of jurisdiction exists over the plaintiff United States. The sentence quoted by the majority from the *Inland Credit* opinion does not address this issue. A subsequent sentence does: "[I]t is undeniable that Inland is subject to this Court's *in personam* jurisdiction." 552 F.2d at 1152.

4. It is actually unclear over what or whom the plaintiff in *Taylor* was trying assert jurisdiction. The court noted that jurisdiction might still lie had the case involved *in personam* claims over the ship owner. 683 F.2d at 1362 n. 2.

5. In both *Harvey Marine* and *Taylor* the *res* was literally gone, its location either unknown or its existence terminated. In this case the government has the *res* and it is sitting in a facility in Missouri.

An admiralty court should not be hampered in its efforts to reach substantial justice by inexorable rules invoked by the parties. *Mosher v. Tate*, 182 F.2d 475, 479 (9th Cir.1950) (quoting *The Minnetonka*, 146 F. 509 (2nd Cir.1906)). Admiralty rules should not be construed in a hypertechnical manner to frustrate their adjudicative purpose. *Trans-Asiatic Oil*, 804 F.2d at 779. The admiralty cases in the Fifth and other circuits are characterized by an "interest in rendering justice rather than an automatistic reliance upon rigid legalisms. . . . " *Treasure Salvors I*, 569 F.2d at 334.

The majority today violates these principles by resuscitating an anachronistic and conceptually flawed rule of admiralty, and applying it to a modern forfeiture action where it does not belong. I would take this in banc opportunity to rid this circuit of this dated jurisdictional jetsam, and hold that we have jurisdiction to hear this appeal. I therefore dissent.

CLARK, Circuit Judge, dissenting, in which ANDERSON, Circuit Judge, joins:

Through a rigid application of principles to which this court has previously refused to adhere blindly, the court divests itself of jurisdiction in this cause. Binding precedent compels the conclusion that the court is obligated to hear this appeal.

The majority's argument that the court has lost *in rem* jurisdiction is predicated upon the admiralty fiction that a ship is a person against whom suits can be filed and judgments entered. The admiralty fiction permits actions to be filed against a vessel when the owner cannot be reached with service of process. It also restrains removal

of a mobile vessel whose owner might wish to escape payment of debts incurred in port. Even in the admiralty context, however, the vitality of the rule has been questioned. In *Continental Grain Company v. The Barge FBL-585*, 364 U.S. 19, 23-24, 80 S.Ct. 1470, 1473, 4 L.Ed.2d 1540 (1960), the Supreme Court held that an action which had been brought *in rem* and *in personam* could be transferred on *forum non conveniens* grounds to a district where the action could not have been brought *in rem*. The Court, explaining the exception it had created, said that "[a] purpose of the fiction, . . . has been to allow actions against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still." But this fiction should not "be transferred into a weapon to defeat that very purpose." This court has previously interpreted *Continental Grain* as evidencing a Supreme Court preference for the "position that the presence of the *res* within the district is not an absolute prerequisite to the court's jurisdiction." *Treasure Salvors v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 334 (5th Cir. 1978), *citing with approval*, 7A *Moore's Federal Practice* ¶ E.05 at E203-06 (1977)[1]; G. Gilmore & C. Black, *The Law*

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1. Professor Moore notes that *Continental Grain* may be persuasive authority for concluding that, with consent of a vessel's owners, *in rem* process can be effectively served in a district in which the vessel is not physical situated and that consent or a general appearance by the vessel's owner will be sufficient to give the court jurisdiction over the cause.

   7A *Moore's Federal Practice*, ¶ E.05 at E206. *See also Reed v. Steamship Yaka*, 307 F.2d at 203, 205 (3d Cir.1962) ("voluntary appearance of the claimant to respond to the libel on its merits . . . was an equivalent and equally effective undertaking that its interest in the ship should be subject to the authority of the court") (cited with approval in *Treasure Salvors*, 569 F.2d at 334.).

of Admiralty 616 (2d ed. 1975).[2]

This view, that the admiralty fiction of personality should not be used to frustrate the adjudication of lawsuits, has been instrumental in the development of exceptions to the traditional admiralty *in rem* rule in both admiralty and forfeiture cases. As the Fifth Circuit has explained,

> in recent years this court [in cases binding on the Eleventh Circuit] has shied away from a strict construction of this *in rem* rule, and has allowed, in certain circumstances, an *in rem* action to continue despite the absence of the *res*. *Specifically*, we have dispensed with strict application of this *in rem* rule *when a legal fiction which exists solely to effectuate the adjudication of disputes is invoked for the opposite purpose, and we have found a substitute basis of* in personam *jurisdiction.*

United States v. An Article of Drug Consisting of 4,680 Pails, 725 F.2d 976, 982 (5th Cir.1984) (emphasis added).

We first dispensed with strict construction of this *in rem* rule in *Inland Credit Corp. v. M/T Bow Egret*, 552 F.2d 1148 (5th Cir.1977), where a ship mortgagee brought suit *in rem* against the vessel and *in personam* against its owner to foreclose on its mortgage. Under a court order, the vessel was sold and the proceeds were distributed to various creditors. Two creditors not sharing in the distribution appealed the decision not to include them. As with the claimant in this case, these creditors had failed

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2. Professors Gilmore and Black note that the "fiction of a ship's personality has never been much more than a literary theme and that "it is not and never has been a principle of decision." Gilmore & Black, *The Law of Admiralty* at 626.

to seek a stay of execution. Because the *res* had been distributed, the mortgagee argued that jurisdiction over the matter had been destroyed. Judge Tuttle explained that

> a strict construction of the limits of *in rem* actions might bar any appeal of an *in rem* action unless supported by continued *in rem* jurisdiction. This narrow view of our jurisdiction, however, is difficult to square with the modern view, now almost a cliche, that *in personam* jurisdiction can be asserted *whenever the defendant has those minimum contacts with the forum state that will satisfy "'traditional notions of fair play and substantial justice.'"*

552 F.2d at 1152. (emphasis added) (citations omitted).[3] While reluctant to decide whether its holding had "critically shaken" the "philosophical underpinnings of the system of *in rem* jurisdiction in admiralty," the court found that being "at the interface of *in rem* and *in personam* jurisdiction" enabled it to "properly exercise a broad *in personam* power." 552 F.2d at 1152 (citations omitted).

The next case in which this court was presented with such an "interface of *in rem* and *in personam* jurisdiction," *see An Article of Drug*, 725 F.2d at 983, was *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir.1978). In *Treasure Salvors*, a Florida corporation sued for possession of and confirmation of title to a vessel located outside the territorial waters of the United States. The United States, intervenors in the district court, appealed summary judg-

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3. In spite of the majority's assertions to the contrary, a close examination of this language reveals that these principles are in no way limited to cases in which the party initiating an action files claims *in personam*.

ment in favor of the plaintiffs, arguing that the district court lacked *in rem* jurisdiction to determine the rights of the parties.

We noted the "common concern of the courts" which had treated related issues "with finding the most practical and efficacious means of resolving disputes before them." We noted further that their decisions demonstrated "[a]n interest in rendering justice rather than an automatistic reliance upon rigid legalisms." 569 F.2d at 334.[4] The court held that although no party had brought an *in personam* claim, the United States, by intervening in the action as a party defendant/claimant and by stipulating to the district court's admiralty jurisdiction, had "waived the usual requirement that the *res* be present." *Id.* at 335.

In a more recent case, decided under the seizure and forfeiture component of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.*, the Fifth Circuit again held that *in personam* jurisdiction over the parties existed even though no party had filed an *in personam* claim. *An*

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4. The court referred to these decisions: *Continental Grain, supra* (action brought *in personam* and *in rem* could be transferred on forum non conveniens grounds to district where no *in rem* jurisdiction existed); *Steamship Yaka, supra* (voluntary appearance by claimant resulted in waiver of the requirement that the *res* be present); *Booth Steamship Co. v. Tug Dalzell No. 2,* 1966 A.M.C. 2615 (S.D.N.Y.1966) (even though *res* was absent from district, claimant submitted vessel to court's jurisdiction by filing claim, alleging vessel's presence, and making a general appearance). *See also The Fairisle,* 76 F.Supp. 27, 34 (D.Md.1947) (vessel owners appearing in *in rem* action to contest plaintiff's claim "may be equitably treated as if they had been brought into court by personal process"), cited with approval in *Mosher v. Tate,* 182 F.2d 475 (9th Cir.1950).

Article of Drug, supra. The United States sought the forfeiture of a drug that it claimed had not met the requirements specified by the Act. Upon judgment for the drug's manufacturer, which had intervened as a claimant, the United States Marshal released the drug to the manufacturer.[5] The United States, although it had not requested a stay of execution or an order seeking return of the *res*, filed a motion for a new trial which was granted. The manufacturer moved to dismiss the complaint for lack of *in rem* jurisdiction following the removal of the drug from the district; this motion was denied. The United States' motion for summary judgment in the new trial was granted.

The Fifth Circuit explained that *Treasure Salvors* and *Inland Credit* permit the court to find a "substitute basis of *in personam* jurisdiction" when the fiction of personality is invoked for a purpose inconsistent with its true purpose, namely, the adjudication of lawsuits. 725 F.2d at 982. The "substitute basis" of *in personam* jurisdiction stemmed primarily from the fact that, after the release of the *res*, the manufacturer voluntarily appeared before the district court for a number of reasons, including its opposition to the government's motion for a new trial. *Id.* at 984.

Here, the facts are much the same. On October 21, 1985, seventeen days after the government took the plane to Missouri, it filed various papers in the district court, including a memorandum opposing Leybda's motion for

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5. Although the drug was released in violation of the automatic ten-day stay provision of Fed.R.Civ.P. 62(a), this was not a factor in the court's decision.

a new trial. Under the majority's and the government's view, the government should have argued that removal of the *res* destroyed the district court's jurisdiction. Indeed, under this view, the government was not entitled to receive a new trial in *An Article of Drug*. The government cannot have it both ways. Here, the government's continued participation in post-judgment and post-removal proceedings further supports the conclusion that a substitute basis of *in personam* jurisdiction exists in this case. *An Article of Drug*, 725 F.2d at 984.

As the facts in *An Article of Drug* show, a strict adherence to the government's position would lead to absurd results. The district court did not lose its power to order a new trial even though the aircraft was no longer in the jurisdiction. Indeed, by opposing Leybda's motion for a new trial without challenging the court's jurisdiction, the government recognized the court's continuing jurisdiction and its power to order the return of the aircraft. The majority acknowledges that *An Article of Drug* is factually indistinguishable from this case, yet declines to follow it because "precedent in this Circuit does not support [its] holding." Maj. op. at n. 5. A careful review of *An Article Drug* demonstrates plainly that it is well supported by prior decisions which are binding on this court. The majority simply refuses to acknowledge the substantial limitations which this court, and others, have placed on the traditional *in rem* rule. Having voluntarily invoked the jurisdiction of the district court, the government cannot complain about remaining subject to this court's jurisdiction for all purposes that justice requires. *Adam v. Saen-*

ger, 303 U.S. 59, 67-68, 58 S.Ct. 454, 458, 82 L.Ed. 649 (1938), *quoted in Inland Credit,* 552 F.2d at 1152.[6]

The majority relies on two recent decisions of this court, *L. B. Harvey Marine, Inc. v. M/V River Arc,* 712 F.2d 458 (11th Cir.1983), and *Taylor v. Tracor Marine, Inc.,* 683 F.2d 1361 (11th Cir.1982), *cert. denied,* 460 U.S. 1012, 103 S.Ct. 1252, 75 L.Ed.2d 481 (1983), in which we applied the traditional admiralty *in rem* rule. In both these cases, we dismissed as moot admiralty appeals because the vessels in question were no longer within the court's jurisdiction. Both cases are distinguishable. In *Harvey Marine,* a ship was arrested by the district court pursuant to a creditor's claim of a maritime lien. After a post-seizure hearing, the court dissolved the warrant of arrest. The ship, which had been scheduled to leave port on the same day the court dissolved the warrant, did so. We dismissed the appeal because no court could "*proceed* to adjudication" once the vessel had left the territorial jurisdiction. 712 F.2d at 459. The vessel's departure was due to the dissolution of the arrest warrant, not any act of the parties.

In *Taylor,* crew members brought an action *in rem* against a vessel to obtain payment of past wages. The vessel was sold and the proceeds were distributed to pri-

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6. The majority's elaborate effort to distinguish *Adam v. Saenger* is totally unavailing. *Inland Credit* did not cite *Adam* for its holding, but for the equitable principle that a party cannot, under a given set of circumstances—here the absence of the *res*—acknowledge a court's jurisdiction and then, without a change in these circumstances, contend that the court's jurisdiction has vanished. That this court has fully adopted such a principle is clear from the discussion in *Treasure Salvors.*

ority lienholders. We dismissed the claim as moot since the *res* was no longer in the jurisdiction. We noted, however, that if the case had "also involved claims in personam, jurisdiction might still lie." 683 F.2d at 1362 n. 2 (citing *Treasure Salvors, supra,* and *Inland Credit Corp., supra).* Here, because we are "presented with an interface of *in rem* and *in personam* jurisdiction," *An Article of Drug,* 725 F.2d at 983, and because the government is retaining exclusive possession of the plane, *Taylor* and *Harvey Marine* do not apply.

The majority also relies on those cases that hold it is "incumbent upon [claimant] to obtain a stay of the district court's judgment if he desired to preserve jurisdiction for an appeal." *United States v. $57,480.05 United States Currency,* 722 F.2d 1457, 1549 (9th Cir.1984); *see also United States v. 66 Pieces of Jade And Gold Jewelry,* 760 F.2d 970, 973 (9th Cir.1985). We relied on similar cases in *Harvey Marine,* but only to conclude that where the traditional admiralty *in rem* rule does apply, it does not work to deny fundamental fairness to the complaining party. 712 F.2d at 459. The presence of the substitute basis of *in personam* jurisdiction is sufficient to distinguish these cases.

Yet a rigid application of Fed.R.Civ.P. 62's provisions poses substantial problems if the court refuses to acknowledge the presence of *in personam* jurisdiction. In other types of proceedings, when a judgment for property is rendered, the losing party has a choice. He need not post a bond. He can still appeal the judgment. If he wins on appeal, he can bring an action to recover his property or its value. The rule established by the court today enables the United States to defeat the right to appeal a forfeiture

judgment for mobile property if the losing party has insufficient funds to post a bond. Where the subject property is a jet aircraft, the security required to post such a bond is no small sum. The harshness of the Circuit's new rule is fully demonstrated in this case where as the government acknowledged, "Leybda ha[d] no assets other than the Lear Jet." United States' Mem. in Opp. to Claimant's Motion for Attorney's Fees and Costs, Rec. Vol. 10, Tab 352 at 5 n. 1.

I respectfully dissent.

EDMONDSON, Circuit Judge, dissenting:

The idea that, when a plaintiff comes into a court system requesting the courts' assistance in resolving a case, the plaintiff submits its person to the jurisdiction of those courts until the case in finally concluded seems to me to be neither innovative nor unfair. I agree with Judge Vance when he says that "we have had in personam jurisdiction over the United States from the instant the government invoked the jurisdiction of the federal courts to initiate the forfeiture proceeding." I would affirm the judgment of the District Court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5938

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ONE LEAR JET AIRCRAFT, Serial No. 35A-280, Registration No. YN-BVO,

Defendant,

LEYBDA CORP.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(October 2, 1987)

Before RONEY, Chief Judge, GODBOLD, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK and EDMONDSON, Circuit Judges.

BY THE COURT:

On the court's own motion, a majority of the judges in active service having voted in favor of hearing the captioned appeal in banc,

IT IS ORDERED that this case shall be heard by this court in banc *without* oral argument on a date hereafter to be fixed. The order entered on March 2, 1987, denying rehearing in banc is accordingly VACATED. The clerk will specify a briefing schedule for the filing of in banc briefs. The previous panel's opinion is hereby VACATED.

UNITED STATES COURT OF APPEALS
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names Of Parties

October 2, 1987

TO ALL COUNSEL OF RECORD

85-5938—Unifed States v. One Lear Jet;
Leybda Corp.

Enclosed is an order this day entered by the court directing that this case be reheard in banc *without* oral argument with respect to the question of this court's jurisdiction of this appeal. Under Eleventh Circuit Rule 35, the effect of granting a rehearing in banc is to vacate the previous opinion and judgment of this court and to stay the mandate.

Pursuant to this court's direction for the clerk to specify a briefing schedule for the filing of in banc briefs, appellant *and* appellee will have until close of business (5:00 p.m. E.S.T.) *Thursday, October 15, 1987,* to file an original and fourteen (14) copies of their in banc briefs. No extensions of time may be granted. In banc briefs must be filed IN THE CLERKS OFFICE BY THE SPECIFIED DATES.

Sincerely,

MIGUEL J. CORTEZ, Clerk

/s/ Barbara Johnson
Deputy Clerk

Honorable Lenore C. Nesbitt
Robert M. March, Clerk, U. S. District Court, Southern District of Florida

Ira J. Kurzban, Esq.
Jonathan Goodman, Esq.
David O. Leiwant, Esq.
Sonia Escobio O'Donnell, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 85-5938

UNITED STATES OF AMERICA,

versus

Plaintiff-Appellee,

ONE LEAR JET AIRCRAFT,
Serial No. 35A-280,
Registration No. YN-BVO,

Defendant,

LEYBDA CORPORATION,

Claimant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion February 11, 1988, 11 Cir., 1988, — F.2d —).
(March 9, 1988)

Before RONEY, Chief Judge, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HATCHETT, ANDERSON, CLARK and EDMONDSON, Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active

service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Johnson
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-2426

United States of America,	)	
	)	Appeal from the
Appellee,	)	United States
	)	District Court
vs.	)	for the Southern
	)	District of Florida
Leybda Corporation, owner,	)	
	)	(Filed January
Appellant.	)	6, 1986)

Appellant, Leybda Corporation's, emergency motion to stay the transfer or sale of the Lear Jet is denied for lack of jurisdiction.

It is further ordered that this appeal is dismissed for lack of jurisdiction.

December 6, 1985

A true copy.

ATTEST: /s/ Robert St. Vrain

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

Supreme Court, U.S.
FILED
APR 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1725

In The

Supreme Court of the United States

October Term, 1987

ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO, and LEYBDA CORPORATION, S.A.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH AND ELEVENTH CIRCUITS

PETITIONER'S RESPONSE TO THE SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES

Counsel:

BRUCE J. WINICK, ESQ.
University of Miami
School of Law
P.O. Box 8087
Coral Gables, FL 33124
(305) 284-3031

Counsel of Record:

IRA J. KURZBAN, ESQ.
Counsel for Claimant/ Defendant
Kurzban Kurzban & Weinger P.A.
2650 SW 27th Ave., 2nd Floor
Miami, FL 33133
(305) 444-0060

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ONE LEAR JET AIRCRAFT, SERIAL NO. 35A-280, REGISTRATION NO. YN-BVO, and LEYBDA CORPORATION, S.A.,

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UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH AND ELEVENTH CIRCUITS

PETITIONER'S RESPONSE TO THE SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES

1. On April 24, 1987, following the decision of the Court of Appeals for the Eleventh Circuit rejecting the merits of Petitioner's appeal in this forfeiture case, Petitioner Leybda Corporation filed a Petition for Certiorari seeking review of the court of appeals' decision on significant issues of forfeiture law that relate closely to the

issues under consideration in *Kungys v. United States*, No. 86-228. Petitioner sought review of the forfeiture of its $3.2 million Lear jet based solely upon alleged misrepresentations made by crew members of the aircraft in applications for temporary visas at a United States Embassy abroad. In July, 1987, the United States filed a Brief agreeing that the Petition "should be held pending the decision in *Kungys v. United States*, No. 86-228, and disposed of in light of the decision in that case." *Brief for the United States*, p.7. It did not object to the jurisdiction of this Court or the court of appeals to hear Petitioner's claims.

2. On October 2, 1987, the Court of Appeals for the Eleventh Circuit *sua sponte* granted rehearing *en banc* thereby vacating the panel opinion that is the subject of the April 24, 1987 Petition for Certiorari. On February 11, 1988, the *en banc* court found it lacked jurisdiction over the forfeiture appeal because the government had removed the *res* from the district. On February 24, 1988, Petitioner filed a motion for reconsideration of the *en banc* decision in the Eleventh Circuit and by letter notified the Clerk of this Court and the Office of the Solicitor General that it would shortly be filing a Supplement to the initial Petition for Certiorari, and requesting that the Court withhold decision on the initial Petition pending consideration of the Supplemental Petition. On March 17, 1988, Petitioner filed its Supplement to Petition for Writ of Certiorari requesting that this Court grant certiorari on the significant jurisdictional issues presented, and thereafter consider the significant forfeiture law issues raised in the initial Petition. On the same date, the United States filed its Supplemental Memorandum for the United

States in Opposition, which, without referring to the Petitioner's Supplemental Petition, urged that the Petition be denied on the basis that the initial Petition addresses only the panel's ruling, since vacated, on the forfeiture law issue.

3. On March 24, 1988, in an abundance of caution, Petitioner filed a Petition for Writ of Certiorari from the jurisdictional determination of the court of appeals, raising in substantially identical terms the issues set forth in its Supplemental Petition.

4. Notwithstanding the Solicitor's claim, this Court continues to have jurisdiction to consider the April 24, 1987 Petition for Certiorari, as supplemented by the Supplemental Petition for Certiorari filed on March 17, 1988. *See Mercer v. Theriot,* 377 U.S. 152, 153-154 (1964). The Court should grant certiorari to consider the significant jurisdictional questions raised in the Supplemental Petition, and should then consider the significant forfeiture law issues raised in the April 24, 1987 Petition. In the alternative, this Court has jurisdiction to consider the March 24, 1988 Petition for Certiorari. The issues raised in the Supplemental Petition and March 24, 1988 Petition, never addressed by the United States in its Supplemental Memorandum, are significant ones which themselves merit certiorari. This Court should grant certiorari to consider them, and if they are resolved as Petitioner urges, should thereafter either consider the merits of the significant forfeiture law issues in the initial petition, see

Mercer, supra, or remand them for reconsideration by the court of appeals.

Respectfully submitted,

KURZBAN KURZBAN AND WEINGER, P.A.
2650 SW 27th Avenue, 2nd Floor
Miami, Florida 33133
(305) 444-0060

By: /s/ IRA J. KURZBAN, ESQ.
BRUCE J. WINICK
University of Miami School of Law
P.O. Box 8087
Coral Gables, Florida 33124
(305) 284-3031